



[GW Law Faculty Publications & Other Works](#)[Faculty Scholarship](#)

2012

Mobility Measures

Naomi Schoenbaum

George Washington University Law School, nschoenbaum@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

Naomi Schoenbaum , Mobility Measures, 2012 BYU L. Rev. 1169-1235.

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Mobility Measures

Naomi Schoenbaum*

Geographic mobility is a celebrated feature of American life. Deciding where to live is seen not only as a key personal freedom, but also a means of economic advancement. Millions of Americans move each year over great distances. But while this right to travel is safeguarded by the Constitution, these mobility decisions are not entirely free. In terms of the decision to move long distances, employment and family reasons are central, and a regime of employment and family law “mobility measures” play a significant role in regulating why and how we move. This Article first sets forth this new framework of “mobility measures,” which are constituted by employment law sorting (moving across employers and space for employment purposes) and family law clustering (moving with a legally defined, portable family unit). These mobility measures not only enable and facilitate long-distance moves with billions of dollars of subsidies per year, but they motivate these moves to take a particular form: to move for employment purposes, taking only our nuclear family with us. In this way, we are encouraged by the law to move, yet the law limits our ability to mitigate the disruption caused by the move. So while mobility has its benefits, this Article argues that it has underappreciated costs. Long-distance moves destroy place-specific investments with our closest supporters that are crucial for everyday functions, as well as economic productivity. These relationship and economic costs affect all long-distance movers, but weigh particularly heavily on one group—women. This combination of employment sorting and family clustering makes mobility more problematic than it needs to be. This Article offers ways of altering employment sorting and family clustering to optimize the balance

* Associate Professor of Law, George Washington University Law School. This paper has benefited enormously from conversations with and comments from Daniel Abebe, Kathy Abrams, Kerry Abrams, Susan Appleton, Douglas Baird, Anya Bernstein, Alex Boni-Saenz, Eleanor Brown, Mary Anne Case, Tony Casey, Ros Dixon, Lee Fennell, David Fontana, Jake Gersen, Tom Ginsburg, Mitu Gulati, Laura Hildner, Dan Ho, Aziz Huq, Brian Leiter, Gillian Lester, Saul Levmore, Jonathan Masur, Richard McAdams, Tom Miles, Martha Nussbaum, Angela Onwachi-Willig, Randy Picker, Rachel Rebouche, Laura Rosenbury, Andres Sawicki, Julia Simon-Kerr, Lior Strahilevitz, Matthew Tokson, Laura Weinrib, David Weisbach, Deborah Widiss, Steve Willborn, and Noah Zatz. I also thank participants at the Law and Society Conference, the Southeastern Association of Law Schools Conference, and the University of Chicago Law School Works in Progress Seminar for helpful feedback.

between the two and reap more benefits from mobility with fewer costs. These reforms would soften sorting while expanding clustering, and at the same time would encourage certain forms of mobility (particularly to cities) that would permit a more optimal combination of sorting and clustering.

I. INTRODUCTION

How portable is your life? This is the question that, on average, tens of millions of Americans have to decide every year. The portability question, as the *New York Times* recently noted,¹ has taken on newfound significance at a time of high unemployment and slack job markets, which have led many to look for employment in distant locations. Indeed, while many of us know of the massive stimulus legislation President Obama sponsored, what is less known is that there are billions of dollars allocated in that law to facilitate Americans moving because of these economic realities.² This law fits within a larger legal regime that calibrates the portability of our lives. Yet we do not see the role the law plays in shaping our moves—or how the law could better shape mobility decisions and their consequences.

Geographic mobility is one of the defining features of the American ethos.³ Freedom of movement is associated with the highest values of American democracy: liberty, autonomy, and upward mobility. And we have enshrined the notion of free movement with a constitutional right: the right to travel.⁴ Residential mobility has been a central American feature from the country's inception. When Alexis de Tocqueville visited the United States in 1831, he observed with amazement how easily Americans changed residences: "In the United States, a man will carefully construct a home in which to spend his old age and sell it before the roof is

1. Phyllis Korkki, *How Portable Is Your Life?*, N.Y. TIMES, Nov. 7, 2010, at B14.

2. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 1833, 123 Stat. 115, 386 (2009) (codified as amended at 19 U.S.C. §§ 2297–98 (2012)) (providing increase in the relocation allowance for federal trade adjustment assistance); U.S. DEPT. OF LABOR, UI MODERNIZATION INCENTIVE PAYMENTS—APPROVED APPLICATIONS 1 (2011), available at <http://workforcesecurity.doleta.gov/unemploy/laws.asp#modern> (reporting federal payments to states for unemployment insurance modernization, including for benefits due to relocation).

3. Shigehiro Oishi & Ulrich Schimmack, *Residential Mobility, Well-Being, and Mortality*, 98 J. PERSONALITY & SOC. PSYCHOL. 980, 980 (2010).

4. See Leonard B. Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 47–49 (1956).

on. . . . He will settle in one place only to go off elsewhere shortly afterwards with a new set of desires.”⁵

American exceptionalism vis-à-vis mobility persists. Americans are twice as mobile as Europeans.⁶ Between 2008 and 2009, 37.1 million Americans moved.⁷ Legal scholarship to date has continued to celebrate American mobility. In a recent article, Professor Robert Ellickson described the benefits of a residential move as “massive,” praising mobility as a way to seek better matches for housing, housemates, neighborhood, and municipality.⁸

But not all moves are created equal. For moves of a greater distance—currently nearly one-third of all moves⁹—there are more substantial costs. Employment law and family law are in the middle of those costs—not housing law, as scholars like Ellickson and others have assumed.¹⁰ For these moves, employment and family considerations are central,¹¹ with the result that in a typical recent year, almost seven million Americans moved an average of 400 miles due to their job or family.¹² This Article is about this category of

5. *Id.* (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 623 (1835)).

6. See Larry Long, *Residential Mobility Differences Among Developed Countries*, 14 INT’L REGIONAL SCI. REV. 133, 137 (1991). The reasons posited for these differences range from cultural (the U.S. is a nation of immigrants that keeps moving) to geographic (larger country size correlated with higher mobility), but none have been proven. See *id.* at 135–46; Raven Molloy, et al., *Internal Migration in the United States*, 25 J. ECON. PERSPECTIVES 173, 191–92 (2011).

7. See DAVID K. IHRKE, ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, GEOGRAPHIC MOBILITY: 2008 TO 2009 2 (2011), available at <http://www.census.gov/prod/2011pubs/p20-565.pdf>.

8. ROBERT C. ELICKSON, LEGAL CONSTRAINTS ON HOUSEHOLD MOVES: SHOULD FOOTLOOSE AMERICANS ENVY THE ROOTED FRENCH? 36 (2010), available at <http://www.nd.edu/~ndlaw/conferences/lawecon/Ellickson.pdf>.

9. See IHRKE, ET AL., *supra* note 7, at 2. The census separates intracounty moves from intercounty, interstate, and international moves. For purposes of this Article, I consider the latter three types long-distance moves. From 2008 to 2009, long-distance moves had an average distance of approximately 400 miles and a median distance of approximately 100 miles. *Id.* at 15 tbl.6. 24.1% of long-distance moves were over 500 miles. *Id.*

10. See generally ELICKSON, *supra* note 8; Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093 (2009).

11. See IHRKE ET AL., *supra* note 7, at 15–17. Employment-related reasons were the most significant for intercounty moves (35.5% in total), followed by family-related reasons (26.6%), and then housing-related reasons (24.3%). *Id.* at 16 tbl.7. Employment-related reasons become even more salient for moves of greater distances. See *id.* at 16 (43.8% for moves of 50 to 199 miles; 54% for moves of 200 to 499 miles; and 43.9% for moves of 500 or more miles).

12. See *id.* at 16 tbl.7 (26.6% of a total of 11,034,000 long-distance movers for family reasons, or 2,935,044, and 35.5% of 11,034,000 long-distance movers for employment reasons, or 3,917,070). While geographic mobility in the U.S. remains high from a comparative perspective, it has nonetheless been in decline, and has reached near historic lows.

long-distance domestic moves,¹³ and the intersection of employment law and family law that regulate them.

A larger constellation of laws, including the federal mortgage tax deduction,¹⁴ military transfers, and highway subsidies, among others, undoubtedly influences long-distance mobility. Employment law and family law are the focus of this Article not only because they regulate the areas of our lives that motivate a significant proportion of long-distance moves,¹⁵ and thus are key factors in determining why, when, and how often we move over longer distances, but also because they play a critical role in regulating the welfare and distributional consequences of long-distance moves, as discussed below.

The combination of employment sorting as a result of employment law and family clustering as a result of family law is a central feature of long-distance mobility and is what this Article terms “mobility measures”: the various features of employment law

See id. at 2–3 (noting a very recent slight uptick in moves but due to intracounty moves); WILLIAM H. FREY, THE GREEN AMERICAN MIGRATION SLOWDOWN: REGIONAL AND METROPOLITAN DIMENSIONS 2 (2009), *available at* http://www.brookings.edu/~media/Files/rc/reports/2009/1209_migration_frey/1209_migration_frey.pdf. So, for example, less than a decade ago, the comparable figure for employment- and family-related long-distance moves was 10 million Americans. *See* JASON P. SCHACHTER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, GEOGRAPHICAL MOBILITY: 2002 TO 2003 12 tbl.F (2004), *available at* <http://www.census.gov/prod/2004pubs/p20-549.pdf>. Despite the decline in the total number of long-distance moves in the last decade, there has been a modest increase in the relative proportion of long-distance moves due to employment and family reasons. *See* IHRKE ET AL., *supra* note 7, at 16 tbl.7 (family reasons increased from 25.9% to 26.6% of long-distance moves and employment reasons increased from 32.6% to 35.5% of long-distance moves). Although the “Great Recession” and the crash of the housing market have been blamed, *see* FREY, *supra* note 12, at 1, the slowdown in mobility predates these developments, and the cause is uncertain, *see* Molloy, *supra* note 6, at 175. This Article is a response to uncritical proposals to subsidize mobility in the face of this slowdown. *See infra* note 78 and accompanying text.

13. This Article focuses on domestic mobility issues. In the international context, the difficulties of mobility are, in most cases, magnified and complicated by immigration law. As a general matter, the distance is greater, making it more difficult to maintain strong ties in another time zone, and there are cultural and language barriers to overcome. Note though that the two primary long-distance mobility considerations raised by this Article—employment and family—are two of the driving forces behind immigration policy. *See* Adam Cox & Eric Posner, Delegation in Immigration Law (Feb. 2012) (unpublished draft) (arguing that immigration law delegates authority to employers, families, and states), *available at* ssrn.com/sol3/papers.cfm?abstract_id=1924382. In a nation as large as the United States, spanning several time zones, with metropolitan areas all over the country, domestic mobility can mean more than it would in a smaller country.

14. Although home ownership is negatively correlated with mobility, the effect of the deduction on ownership is modest because larger deductions go to the wealthiest who would likely own homes anyway. *See* Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction*, 17 TAX POL’Y & ECON. 37, 37 (2003).

15. *See supra* note 11 and accompanying text.

and family law that enable and facilitate long-distance mobility. Employment “sorting” means that employment law enables and facilitates employees to sort easily across employment situations and in so doing they can and often do sort across long distances. Employment sorting allows for mobility at virtually any time, without consideration of socially and economically significant place-specific roots. Family “clustering” means that family law enables and facilitates a cluster of family relationships that are, because of this cluster, made portable. Although the family cluster is meant to provide social insurance upon long-distance moves, by failing to recognize other significant relationships across space, it places a ceiling on the family cluster instead of a floor. While it is difficult to quantify the precise causal role of mobility measures, as this Article demonstrates, these laws are key factors in enabling and facilitating long-distance moves.

Conventional understandings of employment law and family law fail to realize the ways in which they regulate mobility, and how, through their relationship to mobility, these areas of law are linked.¹⁶ Theories of employment law have been primarily concerned with the terms of the employment relationship, but have not appreciated how these terms affect employment relationships across space.¹⁷ Core areas of employment law, such as the at-will doctrine and Title VII of the Civil Rights Act of 1964, enable geographic mobility by minimizing attachments between employees and employers,¹⁸ allowing employees to cross employers and geography with ease. And employment law facilitates mobility with subsidies to offset the costs of relocation undertaken for long-distance sorting moves.¹⁹

Likewise, theories of family law have centered on which relationships the law will recognize and what rights and duties will

16. By connecting employment law to the regulation of intimate relationships, this Article is part of an emerging body of scholarship critiquing the current narrow confines of the family law canon. See, e.g., Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 761–65 (2011); Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL’Y 117, 135–36 (2011).

17. See, e.g., Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 369 (2011).

18. See DAWN D. BENNETT & LAURA P. HARTMAN, *EMPLOYMENT LAW FOR BUSINESS* 30 (6th ed. 2009).

19. See sources cited *supra* note 2; IRS, SOI TAX STATS – INDIVIDUAL INCOME TAX RETURNS, COMPLETE YEAR DATA STATISTICAL TABLES, TABLE 1—INDIVIDUAL INCOME TAX, ALL RETURNS: SOURCES OF INCOME AND ADJUSTMENTS, TAX YEAR 2009, available at <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=133414,00.html> (noting over two billion dollars in relocation tax deductions).

be mapped on to these relationships,²⁰ but the spatial component of these legal rules has been largely neglected. Enabling family laws construct the relevant cluster across space as the nuclear family, permitting us to take these crucial family relationships with us as we move long distances. Facilitating family laws provide tax breaks and other financial support for defined family clusters moving long distances and create child-custody rules that facilitate long-distance moves.

This Article makes the following core claim about long-distance moves and the mobility measures that regulate them: although mobility confers a host of significant benefits in terms of economic growth and labor-market efficiency,²¹ as well as in promoting self-determination and preference satisfaction,²² mobility measures fail to take account of the significant costs of long-distances moves. First, the combination of employment sorting and family clustering has harmful welfare consequences—relationship costs in terms of lost local strong ties and economic costs in terms of lost productivity—that should be considered in calibrating mobility measures. Second, there are distributional consequences to long-distance mobility. The benefits of mobility are not shared equally within the family, and the burdens tend to be borne disproportionately by women. Mobility measures do not adequately account for these distributional aspects of long-distance moves.

On the first point, when individuals or families uproot from their communities for employment sorting, family clustering means that the only form of social cushion they bring with them is the nuclear family. Relationship costs result from the loss of close relationships outside the nuclear family, known as “strong ties”—the ties that involve the greatest amounts of “reciprocity, emotional intensity and intimacy” rather than “casual” interactions.²³ Local strong ties provide support that is crucial for sustaining our sense of self and everyday existence, especially for those with caregiving

20. See generally NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

21. See *infra* notes 30–32 and accompanying text.

22. See, e.g., WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS* 58–61 (2001) (arguing that mobile homebuyers can “shop for a community” that fits their preferences); Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOC. PHIL. & POL’Y 202–04 (2011) (discussing how mobility across jurisdictions enables “foot voting” that leads to a more informed citizenry).

23. Lior J. Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 953 n.119 (2005).

responsibilities.²⁴ However, these ties are damaged by the combination of sorting and clustering under current legal rules.²⁵ And while employment sorting may bring economic benefits, long-distance movers and their employers may also take an economic hit. In addition to the welfare deficits resulting from the loss of strong-tie support, there is also significant lost productivity, for which the current legal regime of sorting and clustering is at least partially to blame.²⁶ Shortcomings in decisionmaking, including information deficits and cognitive biases, that lead employees and employers to make weighting errors in assessing the costs and benefits of sorting suggest that sorting decisions may not be welfare maximizing under the current legal regime.

On the second point, the economic costs of mobility measures are not borne equally within the family. One spouse—the sorting spouse—will drive the sorting move and gain the benefits of sorting, while the other spouse—the clustering spouse—will disproportionately fill the cushioning support role of the family cluster. This distribution of sorting and clustering falls along gender lines and plays a significant role in the ongoing gender wage gap, with repercussions for single, married, and divorced women alike. This Article thus also contributes a spatial understanding of legal barriers to gender equality that has gone unnoticed.

Despite mobility's significant benefits, then, once it is recognized that mobility is not an unmitigated good, laws and policies that uncritically promote mobility require further examination. The costs and distributional consequences of mobility flow in large part because even though employment and family law regulate the same area of social experience—long-distance moving—their regulation is not coordinated. To remedy these costs and consequences, I propose that employment law and family law interact even more than they do. While mobility has its benefits, my proposals focus on adjusting the costs of sorting and clustering for employers, employees, and families to optimize mobility by reaping more of its benefits with fewer costs. I offer ways to adjust the relative costs of hiring long-

24. See Corey M. Clark, *Relations Between Social Support and Physical Health*, PERSONALITYRESEARCH.ORG, www.personalityresearch.org/papers/clark.html (last visited Mar. 9, 2012).

25. See William H. Simon, *Introduction: Lawyers and Community Economic Development*, 95 CALIF. L. REV. 1821, 1821–23 (2007) (arguing that strong ties do not have to be based on geographical proximity).

26. See Janice Y. Benjamin & Lorrie Eagles, *Support Services to Relocated Families Increase Employee Job Performance*, 17 J. CAREER DEV. 259, 259–60 (1991).

distance as compared with local employees, so that employers will internalize the costs of long-distance sorting, as well as ways to provide better support to long-distance sorters and their families. I also recommend ways that family law could recalibrate the family cluster to recognize the geographic significance of strong ties outside the nuclear family. Finally, I propose mitigating the costs of long-distance moves through an “agglomeration” mechanism that brings more employment opportunities and strong ties to the same place: the city. While others have sung the praises of cities,²⁷ they have not yet recognized the benefits of agglomeration from the perspective of mobility measures.

This Article proceeds as follows: Part II introduces the legal regime of mobility measures: the laws that enable and facilitate employment sorting and family clustering. Part III complicates the story by setting forth the relationship and economic costs that result from mobility measures. Part IV further complicates the story by setting forth the distributional consequences that result from mobility measures. Part V presents ways that mobility measures might be modified to optimize the benefits of mobility while alleviating its costs.

II. MOBILITY MEASURES

Employment law and family law are central parts of the story of geographic mobility. The core areas of employment law sort and the core areas of family law cluster to create a law of mobility measures. In the context of mobility, the combination of employment law sorting and family law clustering means that individuals move long distances for employment and bring their nuclear families with them. Central employment and family law doctrines enable this form of mobility by making these long-distance moves more likely to transpire and by defining the terms of these moves. Other key employment and family law doctrines directly facilitate long-distance mobility by adjusting the costs and consequences of these moves to make them more likely and more rewarding. All together, billions of dollars of government funds are spent on employment and family measures that enable and facilitate sorting and clustering.²⁸ The

27. See, e.g., EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER (2011); David Schleicher, *The City as Law and Economic Subject*, 2010 U. ILL. L. REV. 1507.

28. See *supra* note 19.

amalgam is a profound and sometimes problematic combination of mobility measures.

A. The Law of Work and Mobility

Sorting is a definitional feature of employment law. In the employment context, sorting means that individual employees move across employment situations to maximize their labor value. Maximizing labor value may mean finding employment, earning higher wages, developing human capital, or achieving more fulfilling work. The values underlying employment sorting are twofold: liberty and efficiency. The “free choice to work” includes not only whether one works, but *where* one works.²⁹ Employment sorting is also seen to promote efficiency and growth. Because workers vary in their productivity across jobs, “[t]he problem is one of optimally assigning workers to jobs.”³⁰ Unbounded sorting, especially across geography, expands opportunities and allows for better matches between workers and firms.³¹

Geographic mobility flows from this sorting rationale for employment law. Place of residence is linked to place of work because of the norm of (and need for) workers’ physical presence at, and thus residential proximity to, the workplace.³² Under the neoclassical economic theory of the labor market, geographic mobility serves as an equilibrating mechanism that distributes people and wealth.³³ Workers move from areas where jobs are dwindling (or lower paying) to areas where workers are needed (or earnings are higher).³⁴ Long-distance moves in particular are investments to achieve higher wages and develop human capital.³⁵ This is especially true for workers with greater investments in human capital, who can

29. See Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 531 (1997).

30. Boyan Jovanovic, *Job Matching and the Theory of Turnover*, 87 J. POL. ECON. 972, 974 (1979).

31. See HOLGER BONIN, ET AL., IZA RESEARCH REPORT NO. 19: GEOGRAPHIC MOBILITY IN THE EUROPEAN UNION: OPTIMISING ITS ECONOMIC AND SOCIAL BENEFITS 52 (2008), *available* *at* http://www.iza.org/en/webcontent/publications/reports/report_pdfs/iza_report_19.pdf.

32. Residential proximity to the workplace is relative, and depends on willingness to commute. See *infra* Part V.C on commuting.

33. See Michael Greenwood, *Human Migration: Theory, Models, and Empirical Studies*, 25 J. REGIONAL SCI. 521, 527 (1985).

34. See *id.*

35. See Kathryn L. Shaw, *The Influence of Human Capital Investment on Migration and Industry Change*, 31 J. REGIONAL SCI. 397, 401 (1991).

reap greater benefits from long-distance moves. Indeed, long-distance moves are more common among workers with more education, which means that this Article addresses a phenomenon that, while surely touching all segments of the population, is more common among a particular social class.³⁶

1. Enabling laws

Core employment law doctrines enable sorting, and in so doing, enable geographic mobility. By defining when and why employment relationships with employers and particular worksites can permissibly begin and end, employment law regulates the frequency with which employees sort, and thus the frequency with which they move over longer distances to sort. By keeping attachments between employees and employers (or worksites) to a minimum, enabling laws encourage sorting both on the part of employers—by allowing them to hire, fire, and transfer at will—and employees—by allowing them to depart and start at will. Enabling laws also encourage sorting by eliminating barriers to sorting, including discrimination, residency requirements, and job-lock³⁷ associated with employer-provided benefits.

a. Maintaining a loose tie between employees and workplaces. Employment law that regulates the tie between employers and employees favors sorting, regardless of whether it relates to job switching or job transfers. The key doctrine governing this tie is employment-at-will.³⁸ Under this doctrine, either an employer or employee can terminate the employment relationship without cause, at any time, which means there are no general restrictions on employees' ability to sort across firms.³⁹ Because protections against

36. See SCHACHTER, *supra* note 12, at 5 (noting that 23% of movers with a bachelor's degree made an interstate move, as compared with 15% of movers with less than a high school education). Although short-distance moves are more common than long-distance moves on average, one education group was more likely to move more than 500 miles than to move under 50 miles: those with graduate degrees. *Id.* at 11. See *infra* note 99 for additional discussion of education, class, and mobility.

37. The phenomenon of workers staying in jobs to avoid the loss of health insurance has been referred to as "job-lock." Jonathan Gruber & Brigitte C. Madrian, *Health Insurance and Job Mobility: The Effects of Public Policy on Job Lock*, 48 INDUS. & LAB. REL. REV. 86, 86 (1994).

38. Although the at-will relationship is governed by state law, all states but one (Montana) apply some version of it. See Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 459 (2008).

39. See RICHARD A. BALES, ET AL., UNDERSTANDING EMPLOYMENT LAW 1 (2007).

termination (for example, anti-discrimination laws and terminations against public policy) serve as only limited exceptions to employers' broad firing discretion,⁴⁰ employment-at-will remains the organizing principle of the employment relationship.⁴¹ The ability of employees to move freely across employers under the at-will regime embodies the notion of employment sorting.⁴² And employment sorting embodied in the at-will regime has only intensified with changes in the employment relationship in recent decades. Until the 1970s, most employees worked for one employer throughout their careers, moving up the ranks of a single hierarchical firm.⁴³ Now, most American workers are mobile, with shorter job tenure, sorting between firms as the means to career advancement.⁴⁴ Employment-at-will enabled this enhanced sorting; under a legal regime of job security, this transformation in the employment relationship could not have occurred.

This regime also has a spatial component. Because employment-at-will places no restrictions on employees' ability to sort across employers, it enables geographic mobility that is often a component of employment sorting.⁴⁵ In contrast to a system of fixed employment contracts, an at-will regime provides greater flexibility that makes it more likely employees will move long-distance for a new job. Rather than being restricted to sorting when a contract ends, the at-will regime allows employees to search for and take advantage of new job opportunities continually, regardless of when or where they materialize.⁴⁶ Especially in the new economy, where workers expect that each new job will provide human capital returns, long-distance mobility for employment sorting is a key component of maximizing human capital.⁴⁷ And in an age when employees are

40. Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 79 (2007).

41. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 73, 77 (2000).

42. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 973–74 (1984).

43. See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 535 (2001).

44. See *id.* at 548.

45. See Bonin, et al., *supra* note 31, at 34 (finding a strong association across E.U. countries between geographic mobility and the frequency of job changes over one's lifetime).

46. See Long, *supra* note 6, at 140–41 (positing that the difference between contract and at-will employment regimes may help to explain the difference in mobility rates in Europe and the United States).

47. See Shaw, *supra* note 35, at 400–01.

more likely to switch careers and fields, at-will employment frees them to take advantage of location-specific opportunities that arise in other fields, particularly those that are time-sensitive or in a regionalized industry (*e.g.*, dot-com boom jobs in Silicon Valley).

In an era of downsizing, when employers are more likely to utilize their at-will rights, long-distance moves may simply be a necessary part of remaining employed. In a slack labor market, if the only job available requires an employee to move, that is what she will do. But for workers with less human capital, employment-at-will may result in job turnover with fewer compensating benefits from sorting. So, despite the liberty associated with sorting, especially for those with fewer job options and especially in a slack labor market, employment-at-will may lead to sorting without reward.⁴⁸

Geographic mobility for employment sorting purposes underlies the law's approach to non-compete clauses. Courts will typically enforce these clauses if they are "adjudged 'reasonable' in time and geographical scope."⁴⁹ Therefore, a reasonable restriction foreclosing competitive activity within a particular geographic area would require the employee to move to another geographic area if the employee wishes to continue in the competitive occupation—a likely proposition given the employee's human capital investments in that particular occupation. Courts have upheld geographic restrictions based on business contacts the employee made or could have made during the course of her employment, allowing a reasonable scope to encompass a commutable region (and sometimes more), thus necessitating a long-distance move to work in the occupation upon enforcement of the covenant.⁵⁰

Employment law enables geographic mobility even when it comes to staying with the same employer by maintaining a loose tie between an employee and her particular worksite. The employer's right to terminate an employee at will includes the right to transfer employees to a new (and distant) location.⁵¹ While the at-will system

48. See Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L.J. 84, 95, 97 (2007) (discussing how employment-at-will is associated with lack of job security and labor mobility, and concomitant risks for employees).

49. *Outsource Int'l, Inc. v. Barton & Barton's Staffing Solutions, Inc.*, 192 F.3d 662, 669 (7th Cir. 1999) (Posner, J., dissenting from a panel enforcing a restrictive covenant not to compete); see generally, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (Brian Malsberger ed., 2d ed. 1998).

50. See John Dwight Ingram, *Covenants Not to Compete*, 36 AKRON L. REV. 49, 67–69 (2003).

51. See Epstein, *supra* note 42, at 972 (assuming right to transfer is subsumed by the at-

of course allows the employee to quit to avoid the transfer, the matter is often not that simple. Unequal bargaining power between employee and employer, the employee's firm-specific human capital, and lack of other employment options may make it difficult for an employee to exercise this right to exit.⁵²

Federal law that protects employees from layoffs enables transfers. The Worker Adjustment and Retraining Notification (WARN) Act, which applies to employers with one hundred or more employees—a small minority of employers—requires covered employers to give notice of mass layoffs, plant closings, and relocations that result in specified employment losses.⁵³ But when an employer relocates, the employer does not have to count as part of the employment-loss totals any employee offered a transfer to a site within a reasonable commuting distance, or a transfer to any other site that the employee accepts.⁵⁴ That the employer can avoid layoff considerations by relocating employees, even to a distant location, encourages transfers, including long-distance ones. It will not be easy for the employee to reject an offer of certain employment, as even a faraway job may be more valuable than unemployment insurance benefits (or the limited backpay available under the WARN Act).⁵⁵ In certain instances, employment law may even remedy the violation of employment rights with a long-distance transfer. Under the National Labor Relations Act, an employer may not relocate a plant to avoid unionization.⁵⁶ But the NLRB has ordered as a remedy for such violations that the employer reinstate employees at the new plant

will relationship).

52. See Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 408–09 (1986) (“The longer the employee has worked for a company, the more specific his job skills have become, the less mobile he is, and the more his investment in the firm becomes his only means of livelihood and self-respect.”).

53. 29 U.S.C. § 2102 (2006). The employment-loss level that triggers protection varies depending on the reason for the employment loss. Compare *id.* § 2101(a)(2) (50 employees for plant closing), with *id.* § 2101(a)(3) (500 employees, or 50 employees if they make up at least 33% of the employer's active workforce, for mass layoffs), with *id.* § 2102(d) (the number of employment losses for two or more groups of workers reaches the threshold level, during any ninety-day period, of either a plant closing or mass layoff).

54. *Id.* § 2101(b)(2).

55. *Id.* § 2104(a)(1)(A). A handful of states regulate work relocations, primarily by requiring notice to employees of such relocations. See, e.g. CAL. LAB. CODE §§ 1400–1406 (West 2011).

56. See *Int'l Ladies' Garment Workers Union, AFL-CIO v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972).

location and pay their moving expenses.⁵⁷ While the tradeoff between transfer and layoff is one many employees might be willing to make, such transfers nonetheless weigh heavily on employees in ways that mobility measures fail to capture.⁵⁸

b. Removing barriers to sorting. Employment law sorts via provisions that remove barriers to employment sorting. This section discusses three of these areas of law: anti-job-lock measures, anti-discrimination law, and restrictions on employment residency requirements.

First, congressional efforts to reduce “job-lock”—employee immobility caused by employer-provided non-wage benefits, especially health insurance—are sorting measures. Employment is the primary source of health insurance in the United States.⁵⁹ Employees who fear losing their insurance coverage upon switching jobs avoid new employment opportunities.⁶⁰ Legal reforms over the last several decades have taken aim at remedying this anti-sorting feature of employment benefits. The Consolidated Omnibus Reconciliation Act (COBRA)⁶¹ and the Health Insurance Portability and Accountability Act (HIPAA)⁶² made health insurance more portable across jobs by extending the opportunities for coverage after an employee leaves a job and by limiting restrictions that an employer can place on benefits for preexisting conditions. The sorting component of these correctives is evident in the floor debate on HIPAA: “Everyone agrees that job lock must be unlocked so that people can move from job to job”⁶³ Health care reform—

57. See Robert A. Swift, *Plant Relocation: Catching Up With the Runaway Shop*, 14 B.C. INDUS. & COM. L. REV. 1135, 1160–61 (1973) (collecting cases).

58. See *infra* Parts III and IV discussing the costs of long-distance moves.

59. More than 90% of private employees receive their benefits from their or a family member’s employer. U.S. CENSUS BUREAU, INCOME, POVERTY & HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 at fig.7 (2009). Whether this will change with the implementation of health care reform is a matter of debate. See Jonathan Cohn, *About that McKinsey Report . . . the Critics Were Right*, THE NEW REPUBLIC (June 24, 2011, 12:25 PM), <http://www.tnr.com/blog/jonathan-cohn/90696/healthcare-mckinsey-obama>.

60. See Alac C. Monheit & Philip F. Cooper, *Health Insurance and Job Mobility: Theory and Evidence*, 48 INDUS. & LAB. REL. REV. 68, 82 (1994) (reviewing mixed literature on the magnitude of job-lock and finding a modest effect).

61. See 29 U.S.C. §§ 1161–1168 (2006) (requiring that employers allow employees and their dependents the option to purchase coverage for a period of time after it would otherwise terminate, which reduces the concern of lost coverage upon leaving a job and allows employees to remain covered during a waiting period).

62. *Id.* §§ 1181–1183 (2006); I.R.C. §§ 9801–9806 (2006).

63. 142 CONG. REC. H9780 (daily ed. Aug. 1, 1996) (statement of Rep. Gus Bilirakis); *Id.* at H9787 (statement of Rep. Pat Roberts) (remarking that nearly four million Americans

including the recent federal health care overhaul—that loosens the link between employment and health insurance by providing coverage outside of employment, has also been justified as a job-lock corrective.⁶⁴ With regard to pensions, reductions in vesting periods for defined benefit contribution plans are part of these pro-sorting reforms.⁶⁵

To the extent these measures free employees to sort across jobs, they also enable employees to sort across geographic regions. By assuring continuing health insurance coverage, these measures reduce the cost of switching jobs, which is particularly significant for already costly long-distance sorting moves. For married couples in which a spouse's job provides health insurance for the family, a long-distance move for a married employee will likely mean that the spouse will have to switch jobs, too. With anti-job-lock measures, the family can move, even if it disrupts the spouse's job, with protection for their health insurance coverage.⁶⁶ Greater sorting may thus be one unintended effect of health care reform.⁶⁷

Second, anti-discrimination law removes barriers to employment sorting. Without prohibitions on discrimination in hiring, employees, especially those who belong to groups traditionally marginalized in the labor market, could be limited to working at firms that hired workers of their "type."⁶⁸ Without protections against discrimination, employees' ability to sort across firms would be limited. Laws like Title VII of the Civil Rights Act of 1964 define

per year might be able to sort better with HIPAA's job-lock correctives in place).

64. See Monheit & Cooper, *supra* note 60, at 69.

65. See 29 U.S.C. § 1053 (2006). As the majority of employees with pensions now have defined contribution plans with no vesting requirement, such as 401(k) plans, pension plans have even less impact on employees' mobility. See Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1194–95 n.49 (2010).

66. For lower income workers, the lack of employer-provided non-wage benefits, such as health insurance, can contribute to excessive job switching, without the compensating benefits from sorting to a better a job. See SUNHWA LEE, KEEPING MOMS ON THE JOB: THE IMPACTS OF HEALTH INSURANCE AND CHILD CARE ON JOB RETENTION AND MOBILITY AMONG LOW-INCOME MOTHERS iv (2007), available at <http://www.iwpr.org/pdf/C360KeepingMoms.pdf>. Among low-income working women, the greatest predictor of employment success is *staying* in the same job—the opposite of mobility—and employer-provided health insurance can play a key role. *Id.*

67. That is, if health care reform leads to less employer-provided coverage. See Stone, *supra* note 48.

68. Limited matching between employer and employee could occur even in the absence of employer animus. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 59–72 (1992). If employee preferences are determined by group characteristics, then employers may prefer homogeneous workforces to reduce the chance of conflict among their employees. *Id.*

categories of employees who might not enjoy the full benefits of sorting and bar hiring discrimination against them.⁶⁹ While discrimination persists, and hiring discrimination in particular is notoriously difficult to prevent,⁷⁰ anti-discrimination laws aim to open all jobs to employees of all types. Anti-discrimination law is especially important for enabling long-distance sorting in light of regional differences in attitudes towards protected groups, including women, minorities, and various religions. Federal anti-discrimination law therefore seeks to create a national labor market for employees to sort among firms across geographies without regard to protected group status.

Third, constitutional regulation of employment enables long-distance sorting through the right to travel.⁷¹ By the early nineteenth century, the “right of a citizen of one state to pass through, or to reside in any other state, for purposes of . . . professional pursuits” was recognized.⁷² More recently, in assessing the constitutional right to travel, the Supreme Court explained that “[f]reedom of movement is important for job and business opportunities,”⁷³ and that “a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State.”⁷⁴ This protection has meant that courts have struck down residency requirements for hiring and professional associations.⁷⁵ The right to travel thus not only embodies the norm of employment sorting, but

69. See 42 U.S.C. §§ 2000(e)–(e-17) (2000).

70. See Naomi Schoenbaum, *It's Time that You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an "Information-Shifting" Model*, 30 HARV. J.L. & GENDER 99, 125–26 (2007).

71. “American constitutional law has long frowned on rules that impair the right of internal mobility.” Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 390 (2008); see also U.S. CONST. art. IV, § 2 (“The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *Saenz v. Roe*, 526 U.S. 489 (1999) (holding that a state’s one-year residency requirement to receive federal welfare benefits unconstitutionally infringed upon the right to travel); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 284–302 (5th ed. 1995) (noting that the dormant commerce clause limits restrictions on mobility).

72. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

73. *Aptheker v. Sec’y of State*, 378 U.S. 500, 519–20 (1964) (Douglas, J., concurring).

74. *Hicklin v. Orbeck*, 437 U.S. 518, 535 (1978).

75. *Att’y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986) (striking down hiring preference for civil service employment for veterans based on state residency requirement). The Court has also struck down residency requirements for membership to the state bar, but under Article IV’s Privileges and Immunities Clause. See *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985).

enables this type of sorting by barring restrictions on it, at least by public employers.

c. Facilitating laws. Sometimes employment law acts as a mobility measure by rewarding long-distance sorting with compensation, including direct subsidies for the relocation of the worker, as well as indirect subsidies for maintaining the family cluster upon a long-distance sorting move. Under the Trade Act of 1974,⁷⁶ the federal government provides billions of dollars⁷⁷ of assistance to workers injured by import competition who relocate long distance⁷⁸ for other employment. Eligible workers are entitled to job training, job-search allowances, and relocation allowances to move for a new employment opportunity.⁷⁹ The tax code permits an income-tax deduction for long-distance, work-related moves,⁸⁰ which subsidizes employment sorting. Expenses incurred “in connection with the commencement of work . . . at a new principal place of work”—for example, the cost of movers, real estate agents, and the like—are deductible, without any cap.⁸¹ In 2009, deductions for moving expenses totaled about \$2 billion.⁸² The enthusiasm for additional sorting subsidies has only increased as anxiety about unemployment in the Great Recession remains high. One recent proposal recommended an extension of federal funding, akin to trade adjustment assistance, for long-distance sorting moves in the form of a general “mobility bank” that would provide relocation loans to a broader set of unemployed workers.⁸³

76. 19 U.S.C. § 2272 (2006).

77. DEP’T OF LAB., TRADE ADJUSTMENT ASSISTANCE REPORT TO THE COMMITTEE ON FINANCE OF THE SENATE AND COMMITTEE ON WAYS AND MEANS OF THE HOUSE OF REPRESENTATIVES 19 (2010), *available at* <http://www.doleta.gov/tradeact/docs/AnnualReport10.pdf> (giving state-by-state financial statistics of assistance).

78. 19 U.S.C. § 2298(a)(2) (2006) (covering only moves not within a reasonable commuting distance).

79. *Id.* § 2298(b). A certified worker is eligible for relocation assistance when the worker is unemployed, local employment is not available, and the worker has an offer of “suitable employment affording a reasonable expectation of long-term duration in the area in which the worker wishes to relocate.” *Id.* § 2298(a)(2).

80. I.R.C. § 217(c) (covering only moves of a particular mileage).

81. I.R.C. § 217(a); I.R.S. PUBLICATION 521 CAT. NO. 15040E 7, 11 (2010).

82. *See* IRS, *supra* note 19.

83. Jens Ludwig & Steven Raphael, *The Mobility Bank: Increasing Residential Mobility to Boost Economic Mobility*, THE HAMILTON PROJECT 7 (2010), *available at* http://www.brookings.edu/~media/Files/rc/papers/2010/10_mobility_bank_ludwig_raphael/10_mobility_bank_ludwig_raphael.pdf.

Another form of sorting subsidy aims to offset relocation costs not just for the individual, long-distance sorter, but also for the sorter's family cluster that joins her in the move. The Trade Act⁸⁴ and the relocation tax deduction⁸⁵ further subsidize sorting in this way by subsidizing the relocation of the sorting employee's family. Unemployment insurance (UI), as "modernized" by the recent stimulus package, also facilitates long-distance sorting through this type of indirect subsidy. UI is a composite state and federal program that provides up to twenty-six weeks of partial wage replacement.⁸⁶ Historically, states denied UI benefits to workers ("clustering spouses") who quit a job to follow a spouse ("sorting spouses") who needed to relocate for employment because such quits were deemed voluntary.⁸⁷

In response to criticism of the failure to acknowledge mobility and the proportion of two-income families affected,⁸⁸ Congress included in the federal stimulus package additional conditions on incentive funds for state UI programs to provide benefits to clustering spouses.⁸⁹ A state satisfies the condition when it does not disqualify an employee from receiving UI benefits because the employee leaves her job to accompany her spouse "(I) to a place from which it is impractical for such individual to commute; and (II) due to a change in location of the spouse's employment."⁹⁰ For the clustering spouse to qualify for benefits, the sorting spouse must be relocating for employment purposes at a distance that would make commuting infeasible.⁹¹ The provision reduces one of the significant costs associated with long-distance sorting: the loss of spousal

84. 19 U.S.C. § 2298(a)(2) (2006); 20 C.F.R. § 617.3(q) (1989) (defining family as spouse and dependents for purposes of covered expenses).

85. I.R.S. PUBLICATION 521 (2010), *supra* note 81, at 8 (explaining that the deduction applies for "anyone who has both [the] former and new home as his or her home").

86. Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 340, 344–45 (2001).

87. *See, e.g.*, *Slusher v. Dep't of Commerce*, 354 So. 2d 450 (Fla. Dist. Ct. App. 1978). *See infra* Part IV.B.1 for a further explanation of these terms.

88. *See Implementing the Unemployment Insurance Modernization Provisions of the Recovery Act in the States*, in NATIONAL EMPLOYMENT LAW PROJECT 7 (Feb. 2010), http://nelp.3cdn.net/8316a05b0d995d0885_k3m6bny02.pdf.

89. American Recovery and Reinvestment Act of 2009, 42 U.S.C. § 1103(f)(3)(B)(iii).

90. *Id.*

91. A state may provide broader eligibility, but the Unemployment Insurance Modernization Act does not require it. *See* Letter from Dep't of Labor, Unemployment Insurance Program Letter No. 14-09, Attach. III, at 6 (Feb. 26, 2009), *available at* <http://wdr.doleta.gov/directives/attach/UIPL/UIPL14-09.pdf>.

income. In this way, UI benefits for clustering spouses subsidize long-distance sorting.

B. The Law of Family and Mobility

Long-distance moves raise questions of relationship fracturing: who within a community of intimates—not only those within our homes, but also extended family, friends, caregivers, and those who receive our care—will come with us in our travels, and how does this community of intimates constrain us in our travels? Through its distribution of rights and privileges, family law answers this question with family clustering: people move with their nuclear family units. The selective nature of family clustering—that some but not all of our intimates move with us—encourages mobility by creating self-sufficient, portable family units. Defining a limited number of relations that are part of the family cluster provides support upon relocation without making it too difficult to uproot.

1. Enabling laws

Foundational family law doctrines encourage nuclear family clustering, and in so doing enable long-distance moves by making part of our lives more portable. Family law privatizes care and support within the domestic family.⁹² Family law's determination of who has rights and duties as family members determines with whom and near whom we want (and perhaps need) to live. Through a distribution of benefits and burdens, family law prioritizes the nuclear family above other intimate relationships—friendships, extended family, and others who provide care and support—creating the nuclear family as the relevant unit for clustering purposes. Family law shapes the family cluster by mandating obligations of care and dependence between spouses⁹³ and from parent to child.⁹⁴

However, family clustering functions as much by granting rights and duties to those inside the family as by denying rights and duties

92. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2187 (1995).

93. See, e.g., CAL. FAM. CODE § 720 (West 2011) (requiring that spouses “contract toward each other obligations of mutual respect, fidelity, and support”); LA. CIV. CODE ANN. art. 98 (1999) (“Married persons owe each other fidelity, support, and assistance.”). The doctrine of necessities obligates spouses to discharge each other's debts for necessary expenses. See, e.g., *Forsyth Mem'l Hosp., Inc. v. Chisolm*, 467 S.E.2d 88 (N.C. 1996) (requiring wife to pay for husband's medical expenses).

94. See IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 503 (5th ed. 2010) (“All American jurisdictions recognize a parental duty to support minor children.”).

to those outside of it. Family law does not recognize the network of caregivers who assist parents in childrearing.⁹⁵ For example, benefits to care for a child, such as those afforded under the Family and Medical Leave Act (FMLA), are typically limited to parents, as is the right to see a child at all.⁹⁶ The Supreme Court invalidated a state statute granting visitation rights to nonparents, under which grandparental visitation was ordered over a parent's objections, as overly intrusive to parental authority.⁹⁷ Family law also denies to friends the benefits that it grants to families, such as FMLA leave, the ability to make decisions about medical care or to inherit under state intestacy rules, and the recognition of certain private agreements.⁹⁸ Because rights and duties associated with care and support are kept within the family, the nuclear family need not remain geographically close to the extended community of intimates. For example, because a grandparent does not have a legal right to visit her grandchildren, a child and his or her parents can move away from the grandparents without any legal restriction. On the flip side, the family cluster also means that the family members—spouses and children—remain together when the family moves to provide and receive the care privatized within the family. If a family cannot remain intact, often a move will not be made, because this care would not be available through public or other private means.

Nor does family law acknowledge the care that the nuclear family provides to those outside of it. The general lack of legal ties between adult children and their parents, and the associated mobility it enables,⁹⁹ can be viewed in contrast to a proposed law in China that would require adult children to provide their parents with physical and emotional care, and would give parents a right to sue to enforce

95. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 387 (2008) (discussing how family law pays little heed to the network of caregivers who assist parents in childrearing).

96. See *id.* at 407–08. The Family and Medical Leave Act is an exception by providing leave for an employee to care for an ailing parent. 29 U.S.C. § 2612(a)(1)(C) (2006).

97. *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000) (plurality opinion).

98. Laura Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 191 (2007); see also Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 697–98 (2007).

99. The proportion of adult Americans living far from their parents varies based on education level. More than half of married individuals with both parents alive and living together lived within ten miles of either their own parents or their in-laws, and two-thirds lived within twenty-five miles, but those with a college education are separated from their parents by a median distance of one hundred miles. Peter A. Rogerson et al., *The Spatial Separation of Parents and Their Adult Children*, 83 ANNALS ASS'N AM. GEOGRAPHERS 656, 660, 663 (1993).

it.¹⁰⁰ Such an obligation to visit elderly parents would limit long-distance mobility, as most people, especially those without extensive resources, would need to live near their parents to comply.¹⁰¹

The selective granting of rights and duties structures the domestic family as the part of our support network that needs to come along on a long-distance move. In this way, family law provides some social insurance upon such moves. In fact, this shock-absorbing function of the family cluster may make us more comfortable with the notion of employment sorting. It is hard to imagine that mobility would be viewed so glowingly without the default rule that at least some of one's closest intimates would cushion the blow of a move. While family law enables long-distance moves by family clustering, some relationships are not portable, an issue discussed in later Parts. This "underclustering" feature of family law perhaps paradoxically enables mobility. Keeping the number of necessary family members to a minimum increases the portability of the clustered family unit by allowing nuclear families (and singles) to uproot from a network of caregivers and friends. Even if "it takes a village" to raise a child, it would be logistically difficult, if not impossible, to take the village along on a move. The self-contained cluster avoids this difficulty.

For mobility purposes, when relationships are sufficiently analogous to marital or parental relationships, they might be brought along on a move. But a long-distance move imposes such costs and risks that, even among cohabiting couples, one partner might not move across the country for the other without a marital commitment. There are other relationships—for example, the relationships of same-sex couples—that may be afforded status in some jurisdictions but not others. These variations in family law across jurisdictions may affect choice of domicile and thus mobility, as those seeking particular rights might choose to move to (or remain in) a jurisdiction that affords them those rights.¹⁰²

100. *China Law to Make Children Visit Parents*, BBC NEWS (Jan. 6, 2011) <http://www.bbc.co.uk/news/world-asia-pacific-12130140> (explaining the proposed amendment to China's Law on Protection of the Rights and Interests of the Aged).

101. The legal history illuminates the relationship between employment sorting, family clustering, and care between adult children and their parents. Lawsuits seeking to enforce contracts or for quantum meruit compensation for care provided by adult children to their elderly parents arose with the industrial age and the rise of geographic mobility to seek work away from one's family of origin. See HENDRIK HARTOG, *SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE* (2012).

102. For instance, a gay couple that wants to marry can only do so in certain states, and the couple may need to remain domiciled in those states to continue to enjoy the benefits of

2. *Facilitating laws*

Beyond enabling mobility by constructing a portable family cluster, family law subsidizes and eases the long-distance moves of the family cluster. By adjusting the costs of maintaining the family cluster at moments of mobility, the law puts a thumb on the scale in favor of the family cluster, as well as mobility.

a. Direct subsidies. Laws such as the Trade Act and tax deductions that subsidize the family's relocation along with the sorting employee not only facilitate employment sorting, but also family clustering.¹⁰³ Likewise, changes in UI benefits for clustering spouses described above provide direct subsidies for mobility of the family cluster.¹⁰⁴ Recall that before recent changes in the law, courts routinely denied UI benefits to clustering spouses. For example, a court considered a case in which the claimant "left her employment . . . to be with her husband but urges that her decision to do so was for the preservation of her 'American home way of life which is the basic foundation of this nation.'" ¹⁰⁵ The court "agree[d] . . . that it is desirable to preserve marriages and keep families together," but denied benefits because the quit was voluntary.¹⁰⁶ The later recognition of this "American home way of life" (modified by the prevalence of two-income households¹⁰⁷) with the granting of UI benefits to clustering spouses facilitates mobility to preserve the family cluster. In keeping with family clustering, the subsidy is provided only to spouses and not to other intimates. In addition to its incentive effect, the policy sends a doubly-reinforcing, family-clustering message: a spouse should quit a job to relocate for her spouse's employment (and the law will subsidize such a departure), but no one else should (and if they do, the law will provide no assistance).

the marriage. Interstate recognition of same-sex marriages is limited by the federal Defense of Marriage Act (DOMA), state "mini-DOMAs," and conflicts of law rules. See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005); see also Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 33, 38 (2010) (discussing inconsistent state laws of parentage of children born through artificial insemination and implications for mobility).

103. See *supra* Part II.A.2.

104. See *supra* Part II.A.2.

105. *Slusher v. Dep't of Commerce*, 354 So. 2d 450, 451 (Fla. Dist. Ct. App. 1978).

106. *Id.*

107. See *infra* Part IV.A.

b. Facilitating mobility and clustering after divorce. Family clustering as a mobility measure remains salient for married couples with children after divorce. After divorce, family clustering faces a challenge. When married couples with children divorce, a question may arise about relocation.¹⁰⁸ Increasingly, shared custody arrangements, and thus post-divorce family unity, are seen to be in the child's best interest.¹⁰⁹ If both parents want to have a substantial relationship with the child, the parents likely need to live near one another. Mobility seems in tension with clustering once the cluster significantly ruptures. For both parents, family clustering has increasingly adjusted to accommodate mobility, albeit imperfectly.

Under shared custody arrangements, one parent is often designated the primary custodian (the "primary parent") and the other acts as the "secondary parent."¹¹⁰ Family law places essentially no limits on the secondary parent's mobility. For the secondary parent, shared custody can be terminated at any time; he can move and forego shared custody, perhaps even as a matter of constitutional right.¹¹¹ Indeed, after the three-year mark, in about half of all joint custody cases, physical custody ends up being exercised by only one parent (typically the mother) substantially all the time.¹¹² Family law's only concern is the secondary parent's satisfaction of any alimony and child support obligations; it does not matter where the secondary parent lives.¹¹³ Indeed, the secondary parent can move away and yet still have a court compel the primary parent to accommodate communication and visitation with the child to maintain the secondary parent's relationship with the child.¹¹⁴ In other words, the secondary parent can still be part of the family cluster from afar.

108. The issue of relocation may also arise at the initial custody determination, but this is less common. See ELLMAN ET AL., *supra* note 94, at 720.

109. See Theresa Glennon, *Still Partners?: Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 113–17 (2007).

110. *Id.* at 115.

111. See Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 67–80 (1995).

112. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 112–13 (1992).

113. See *Holder v. Polaski*, 544 A.2d 852, 854–56 (N.J. 1988) (noting that "in many instances, the mother still receives custody of the children, and the father is awarded visitation rights," and that "[i]mplicit in that arrangement is the right of the father to move elsewhere for virtually any reason").

114. See ELLMAN ET AL., *supra* note 94, at 722.

Even for the primary parent, family law clustering still provides some leeway, and increasingly more so, to move and keep the custodial situation—and thus the new family cluster of the primary parent and the child—intact. When the primary parent wants to relocate a substantial distance with the child and the secondary parent objects, there is a question of whether the primary parent can move without giving up custody of the child. About half the time a court permits the primary parent to move with the child—most frequently to support the two most accepted reasons for long-distance moves: employment sorting (i.e., to pursue an employment opportunity for the primary parent or a new spouse) and clustering of another family unit (i.e., remarriage).¹¹⁵ Indeed, in recent decades, standards for custody relocation have liberalized,¹¹⁶ further facilitating mobility of the primary parent.¹¹⁷ Even when the primary parent is permitted to move, family law still tries to retain some of the integrity of the former cluster. In such cases, a court may order the primary parent to defray the costs of maintaining the secondary parent's relationship with the child (e.g., the costs associated with visitation) as a condition of relocation.¹¹⁸

The privileged view of employment sorting, as well as the underclustering feature of family law, are manifest in courts' varied treatment of relocation requests depending on the reason for relocation. A sizeable number of relocation cases address a primary parent's request to move closer to extended family and friends.¹¹⁹ Parents seeking relocation have cited the economic, emotional, and caregiving support that these relationships would provide.¹²⁰ But

115. See Glennon, *supra* note 109, at 123–26.

116. See ELLMAN ET AL., *supra* note 94, at 722. Custody relocation law varies by state, as does its liberalization. Notably, California has recently retrenched to allow less mobility for primary custodians. See *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004) (granting physical custody to father if mother relocated because of the impact the move would have on the children's tenuous relationship with their father).

117. Statutory reforms making it easier to enforce support orders across state lines have also facilitated the primary parent's mobility. See John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 680 (2008) (noting that some version of the Uniform Interstate Family Support Act is the law in all states).

118. See, e.g., *Walrath v. Pope*, 681 S.E.2d 602, 606 (S.C. Ct. App. 2009) (approving visitation schedule that required mother who relocated with children to reimburse father for one airline ticket per month to visit children); *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33 (Ct. App. 1998) (allowing mother to relocate with children when father's visitation costs were offset by reductions in child and spousal support obligations).

119. See Glennon, *supra* note 109, at 134.

120. *Id.*; see also, e.g., *In re Marriage of Bianco*, No. B161654, 2004 WL 1303620 (Cal. Ct. App. June 14, 2004).

some courts nonetheless express skepticism about moving to be near extended family,¹²¹ and others gloss over or downplay the benefits of relocating to be near this extended network of intimates.¹²² For example, one court, rejecting a mother's request to move where both sets of her children's grandparents lived, denied the relevance of proximity to these relations, stating that the "family may assist them financially and morally wherever they may live."¹²³ In other words, for grandparents, visits are enough.

This sort of skepticism is especially marked in contrast with courts' generally easy acceptance of family clustering¹²⁴ or employment sorting¹²⁵ reasons for relocation. For example, one court underscored the importance of mobility to cluster with the new family by describing a mother's request to relocate to remarry as "the most normal desire in the world."¹²⁶ The skeptical view of moves to be nearer to extended family and friends expresses the strength of family clustering and employment sorting and their correlate: that we move long distance for the family cluster or for employment, not for other relationships. Even when these other relocations are permitted,¹²⁷ the parent must nonetheless overcome the skepticism.

III. WELFARE EFFECTS OF MOBILITY MEASURES

Although the upside of mobility is typically in focus, the current configuration of sorting and clustering means mobility often falls short of this welfare-enhancing ideal. Long-distance mobility is a much thicker social phenomenon with more significant welfare effects than mobility measures currently cognize. So while mobility can bring benefits, it also imposes costs that require consideration to improve mobility's overall welfare effects. The combination of sorting and clustering imposes two types of costs discussed in turn

121. See, e.g., *Sill v. Sill*, 228 S.W.3d 538 (Ark. Ct. App. 2006).

122. See, e.g., *In re Marriage of Austin*, No. 91,222, 2004 WL 720231, at *1 (Kan. Ct. App. Apr. 2, 2004).

123. *Sill*, 228 S.W.3d at 543.

124. See, e.g., *Arriaga v. Gambardella*, No. FA990431585S, 2002 WL 31018577 (Conn. Super. Ct. Aug. 6, 2002).

125. See, e.g., *Potter v. Potter*, 119 P.3d 1246 (Nev. 2005) (granting move for a job that would pay a higher salary and would provide assistance in obtaining an advanced degree).

126. *Arriaga*, 2002 WL 31018577 at *4.

127. The results of these cases are mixed. Compare *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004) (denying relocation to be near extended family), with *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996) (allowing move to be near child's grandparents and cousins).

below: “relationship costs”—the loss of support of local strong ties with intimates outside the family cluster—and “economic costs”—the loss of productivity resulting from the loss of strong ties inside and outside the workplace. Although it is difficult to calculate the costs and benefits of sorting and clustering, there are reasons to believe that information deficits and cognitive biases lead individuals and employers to underestimate the costs of mobility under the current regime, limiting their ability to reach welfare-maximizing decisions.

A. Relationship Costs

Strong ties—our intimates—are enormously important in our lives. They provide crucial support and care that help us get through the day as well as emotional connections that provide richness and texture to our lives. While all strong ties are important, local strong ties, in particular, are best equipped to serve central relational functions and are likely to fade from a distance.

1. The strength(s) of local strong ties

Sociologist Mark S. Granovetter made famous “the strength of weak ties.”¹²⁸ Weaker ties can be helpful by linking together groups of weaker ties and by transmitting simple information, for example, about employment opportunities, across these groups.¹²⁹ This makes weak ties particularly important for success in the market. But it is *strong* ties that provide greater motivation and capacity to seek (and give) the more involved forms of support that are necessary for everyday functioning and for providing meaning in our lives.¹³⁰ Strong ties can perform these functions because, unlike weak ties, these relationships are defined by reciprocity and trust,¹³¹ and they are interconnected (i.e., our close friends are friends with each other). Compared with weak ties, strong ties provide a community

128. Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360, 1360 (1973).

129. *Id.*

130. See Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201, 209–13 (1983); Barry Wellman, *The Community Question: The Intimate Networks of East Yorkers*, 84 AM. J. SOC. 1201, 1222–23 (1979).

131. See Granovetter, *supra* note 128, at 1361 (explaining that tie strength turns on “the amount of time, the emotional intensity, the intimacy (mutual confiding), and the reciprocal services which characterize the tie”). This has been described as the “transitivity” of strong ties. That is, “If Adam and Betty are close friends, and Betty and Charlie are close friends, then it is also likely that Adam and Charlie are close friends. See Damon Centola & Michael Macy, *Complex Contagions and the Weakness of Long Ties*, 113 AM. J. SOC. 702, 704 (2007).

that can transmit the sensitive and complex information necessary for care and emotional support.¹³² Economists tend to think that these community-level social resources enhance welfare not only for their direct effects on utility, but also because they help address common economic problems, for example, overcoming the free-rider problem in providing public goods or creating trust between individuals in the absence of explicit contracts.¹³³

Strong ties communicate feelings of love and value, and a sense of “belong[ing] to a network of communication and mutual obligation.”¹³⁴ In this way, close ties promote self-esteem and happiness, as well as physical and mental health.¹³⁵ And close ties are central to defining who we are: ongoing strong ties help maintain “the continuity of our identity through different life stages and substantial life challenges.”¹³⁶

Strong ties play a critical role in supporting caregiving. In a typical week, the majority of children under five years old are in some type of childcare arrangement, such as care by extended family, daycare, nursery school, or other paid caregivers.¹³⁷ Beyond paid care, caregivers rely extensively on extended family and friends for providing care to children, the elderly, and the disabled.¹³⁸ By providing support when public services are overextended, strong ties “enhance both efficiency and community.”¹³⁹ Beyond caregiving support, strong ties also provide caregivers an outlet from the pressures of domestic life.

Strong-tie support is particularly salient for certain populations. Supportive strong ties play a greater role in communities with fewer resources and for those with less support within the family cluster—

132. See Granovetter, *supra* note 130, at 218 (explaining that strong ties enhance speed of flow, credibility, and influence of information).

133. See Edward Glaeser et al., *An Economic Approach to Social Capital*, 112 ECON. J. F437, F437 (2002).

134. Leib, *supra* note 98, at 655 (quoting Sidney Cobb, *Social Support as a Moderator of Life Stress*, 38 PSYCHOSOMATIC MED. 300 (1976)).

135. See Takeo Fujiwara & Ichiro Kawachi, *Social Capital and Health: A Study of Adult Twins in the U.S.*, 35 AM. J. PREVENTIVE MED. 139 (2008) (finding that social capital (i.e., strong ties) promoted welfare using a sample of twins to control for outside effects).

136. Leib, *supra* note 98, at 655 (noting that strong ties serve as a bulwark against poor health outcomes, from lower mental health to shorter life spans).

137. Murray, *supra* note 95, at 390–91.

138. *Id.* at 391–92.

139. Allan Silver, *Friendship in Commercial Society: Eighteenth-Century Social Theory and Modern Sociology*, 95 AM. J. SOC. 1474, 1495 (1990) (citing MARTIN BULMER, *NEIGHBORS: THE WORK OF PHILIP ABRAMS* (1986)); see also Granovetter, *supra* note 130, at 212–13.

single parents.¹⁴⁰ In part because women do more carework than men, and because women are more likely to be single parents, women rely more on strong ties than men.¹⁴¹ Compared with men, women have larger strong-tie networks.¹⁴² The parties receiving care—often children—benefit enormously from strong ties outside the family cluster, including stable connections to extended family, teachers, and peers.¹⁴³ And while the support provided by strong ties is undoubtedly crucial for members of the domestic family, for those who are single, the absence of a single legally and socially designated point person to meet material and emotional needs may render a network of strong ties still more essential.

Strong ties from a distance wither into weak ties or nonlocal strong ties—what is left after a long-distance move. Physical proximity is important to providing and receiving care and support from strong ties. Many of our most basic needs can only be met with in-person contact: transporting people or goods, providing food or other items when one is ill, and meeting the everyday needs of children or the elderly. Emotional support is often better provided through in-person contact, when a person can watch reactions and respond in kind.¹⁴⁴ The joys of social connection, too, can often best be appreciated through in-person contact, by sharing a meal across from someone at the table, or by engaging in activities. Indeed, the stronger the tie, the more likely the person will provide support,¹⁴⁵

140. See Murray, *supra* note 95, at 391–93 (explaining how caregiving networks may be particularly significant for single parents and in African-American, Latino, immigrant, and gay and lesbian communities); Granovetter, *supra* note 130, at 211–13; see generally CAROL STACK, *ALL OUR KIN* (1974) (describing how close ties are essential for daily survival in the inner city).

141. See Margaret Brinig, *The Division of Labor Across Time and Generations*, in *MARRIAGE AT THE CROSSROADS* (Marsha Garrison & Elizabeth Scott eds., forthcoming 2012); Isabel Dyck, *Mother or Worker? Women's Support Networks, Local Knowledge and Informal Child Care Strategies*, in *WHO WILL MIND THE BABY? GEOGRAPHIES OF CHILD CARE AND WORKING MOTHERS* 132–33, 135 (Kim England ed., 1996).

142. See Toni C. Antonucci & Hiroko Akiyama, *An Examination of Sex Differences in Social Support Among Older Men and Women*, 17 *SEX ROLES* 737, 737 (1987) (finding that as compared with married men, who tend to rely on their spouses exclusively, married women tend to receive support from multiple sources outside the domestic family).

143. See Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 *ANN. REV. SOC.* 1, 9–12 (1998).

144. Face-to-face contact may be important for emotional contagion (i.e., to feel what those around us are feeling) which allows us to relate more fully to those near us. See Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 93 *GEO. L.J.* 399, 435–38 (2006) (explaining how emotional contagion operates through in-person contact).

145. Wellman, *supra* note 130, at 1222–23.

and stronger ties tend to live nearer to one another.¹⁴⁶ Assistance and frequency of contact increase when people are within close geographic range.¹⁴⁷ And beyond the significance of physically proximate individual ties, there are institutions—schools, daycare centers, and nursing homes—for which proximity matters.

Despite the increasing influence of technology in allowing people to maintain faraway relationships, many features of the closeness of a relationship are still associated with geographic proximity. The value of strong ties in providing caregiving support, particularly for everyday or emergency needs, is largely lost when the caregiving network is not geographically close. While nonlocal strong ties may still play a significant role in providing emotional support, technology is not a substitute for physical proximity. Despite e-mail, Facebook, Twitter, and long-distance phone calls, distance still weakens relationships.¹⁴⁸ While the Internet helps to maintain contact with distant and weak ties, relationships' sensitivity to distance is similar pre- and post-Internet, and the most active ties are still nearby.¹⁴⁹ Technology has made it easier to find more customized ties, for instance, an online support group for a rare medical condition or an eBay seller, but these ties are often weaker.¹⁵⁰ Facebook and other "friendships" maintained through new technology have little in common with true friendship: they are devoid of the intimacy that is the hallmark of a strong interpersonal bond.¹⁵¹

Nonetheless, there can be too much of a good thing when it comes to local strong ties. Because reciprocity is a hallmark of strong ties, strong ties often mean not just more support, but more demands as well.¹⁵² Over-reliance on strong ties may be harmful to

146. See Diana Mok et al., *Does Distance Matter in the Age of the Internet?*, 47 URB. STUD. 2747, 2750 (2010) (citing studies reporting that large percentages of strong ties live near each other).

147. Wellman, *supra* note 130, at 1219–22.

148. Mok, *supra* note 146, at 2750, 2778 (explaining that the telephone and the internet tend to "work synergistically with face-to-face contact" to supplement rather than replace it, and that e-mail frequently serves to arrange visits and telephone calls).

149. *Id.* at 2775, 2779–80.

150. Avery M. Guest & Susan K. Wierzbicki, *Social Ties at the Neighborhood Level: Two Decades of GSS Evidence*, 35 URB. AFF. REV. 92, 96, 108 (1999).

151. See SHERRY TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER* (2011); William Deresiewicz, *Faux Friendship*, CHRON. REV., Dec. 6, 2009, at 9, available at <http://chronicle.com/article/Faux-Friendship/49308>. Skype makes greater inroads on seeing and talking to faraway ties.

152. See *supra* note 131 and accompanying text.

low-income populations, who are burdened by these strong ties and less likely to develop the weak ties that are helpful in the labor market.¹⁵³ Just as women disproportionately rely on strong-tie support, so too do excessive strong-tie demands disproportionately burden women. Strong ties may also burden beyond obligations, with mobility as a corrective. Escaping strong ties can mean an escape from restrictive norms, for example, an abusive relationship, or a community that rejects gays and lesbians, and an opportunity to develop more accepting strong ties.¹⁵⁴

At the same time, several features of strong ties buffer against overburdening. There are returns to scale from strong ties, which caregivers may exploit by forming shared daycare and babysitting schemes.¹⁵⁵ Interconnections between strong ties also spread the costs of monitoring so that each member need not be constantly vigilant about other members' needs. Moreover, support received and support given is not zero-sum. Providing support to strong ties brings utility to the supporter,¹⁵⁶ at least partially offsetting the depleting effects of demands. Even when demands are high, knowing that strong ties will reciprocate may be a source of camaraderie and comfort.

Weighing the benefits and burdens of local strong ties is a difficult proposition. Strong ties and weak ties are complements, not substitutes,¹⁵⁷ and success in personal and market-based pursuits requires some mix of the two. My goal is not to argue that mobility measures should preserve local strong ties above all else or to pinpoint the precise circumstances that make mobility worthwhile, but to highlight the thickness of the social phenomenon of long-distance mobility and the costs that mobility measures fail to acknowledge. I return to these concerns in Part IV, where I consider modifications to mobility measures to account for these costs.

153. See Portes, *supra* note 143, at 14–15.

154. See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000) (explaining how mobility was used to escape bad marriages before liberalized divorce laws). The post-Reconstruction Great Migration of African-Americans was a means to escape the Jim Crow South and seek greater freedoms in the North. See *generally* ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

155. Elder care is less apt to benefit from these economies of scale.

156. See Elizabeth W. Dunn et al., *Spending Money on Others Promotes Happiness*, 319 *SCI.* 1687, 1688 (2008).

157. See *supra* notes 128–43 and accompanying text describing the different functions of strong and weak ties.

2. Mobility measures and relationship costs

Because local strong ties are geographically sensitive, long-distance moves will result in the fraying of strong ties outside the family cluster. Mobility measures impose relationship costs in the form of lost local strong ties in two ways. Employment sorting means that we move away from local strong ties, and family clustering does not provide sufficient cushioning from these lost ties. The relationship costs generated by mobility measures can be categorized into two types: costs from the loss of strong ties outside the family cluster, and costs on the family cluster itself.

a. Sorting and local strong ties. Mobility measures encourage the loss of local strong ties outside the nuclear family. Employment sorting ruptures strong ties because long-distance moves are motivated by employment instead of proximity to strong ties. While it is difficult to assess from the available relocation data, which does not account for moves due to multiple factors,¹⁵⁸ employment-motivated moves will, by and large, be moves away from strong ties. As an initial matter, strong ties will typically be strongest in the place where an individual or family has been living for a while. This means that a move away from a domicile of any significant duration will likely also be a move away from strong ties. The exception might be frequent sorting, in which case the sorter may have been unlikely to develop strong ties in the location she is leaving. To the extent that individuals limit sorting to locations where they have at least some strong ties, the impact of lost strong ties will be mitigated, but not eliminated. The long-distance move still requires leaving established relationships and routines, and reestablishing relationships and routines, both with personal and market-based strong ties.

Long-distance sorting imposes the loss of strong ties outside the family cluster, with the concomitant loss of care and support benefits these strong ties provide.¹⁵⁹ A long-distance move places the mover in a position of having only weak ties in the new location, at least for a while. Unlike weak ties, strong ties “build slowly and incrementally over time,”¹⁶⁰ requiring significant investments to rebuild. The

158. The census only allows one category to be selected as the reason for a move.

159. See Portes, *supra* note 143, at 11 (“Leaving a community tends to destroy established bonds, thus depriving [the movers] of a major source of social capital.”); *supra* notes 137–143 and accompanying text on the benefits of strong ties.

160. Daniel J. Brass et al., *Relationships and Unethical Behavior: A Social Network Perspective*, 23 ACAD. MGMT. REV. 14, 17 (1998).

longer the move, the more challenging the replacement of strong ties will be, because the mover will be less likely to have connections in the new location.¹⁶¹ And even if strong ties can be rebuilt, they are not fungible. Beyond the unique connections we have with extended family and close friends, market-based care providers also develop unique relationships with those for whom they care, and are not easily replaceable. Repeated long-distance moves multiply the loss of local strong ties, as well as the efforts to rebuild them, and expectations of mobility in fact reduce investment in valuable strong-tie networks.¹⁶² The very mobile, such as military families, may simply forego investing in ties that will soon be lost.¹⁶³

Moreover, long-distance sorting causes not only the loss of strong ties to the movers, but also the loss of movers to the strong ties, which imposes costs that are difficult for the movers to internalize.¹⁶⁴ Because it takes time to rebuild strong ties in the new community, the gain to the new community is not symmetrical with the loss to the departed community. The loss may be especially large when a long-distance mover has extensive caregiving obligations to someone outside the family cluster, for example, an ailing parent, who is left behind. Outside the FMLA, which provides leave to care for a parent, family law does not recognize this type of caregiving.¹⁶⁵ So even if the long-distance sorter brings along a parent to a nursing home in the new location, mobility measures do nothing to facilitate this extra-nuclear-family clustering.

Although family law traditionally regulates the social relationships in our lives,¹⁶⁶ employment law is also part of the story.

161. See ELLICKSON, *supra* note 8, at 29 (addressing the greater relationship costs of long-distance moves).

162. Glaeser et al., *supra* note 133, at F439 (finding that mobility reduces social capital returns and thus investment in social capital).

163. See PRESIDENT OF THE UNITED STATES, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT 15–20 (2011), *available at* http://www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf (discussing a government initiative to address the costs of repeated sorting by military families).

164. Glaeser et al., *supra* note 133, at F439, F441, F450 (noting that mobility imposes lost social capital in the community departed).

165. See *Weickert v. Weickert*, 602 S.E.2d 337, 340–41 (Ga. Ct. App. 2004) (shifting custody to father after mother relocated from Georgia to California to care for her elderly parents); *supra* notes 96–98 and accompanying text.

166. See Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 36 (2006) (“Family law . . . comprises those sets of laws (1) whose purpose is to regulate relationships among intimates, or (2) whose operation hinges on the existence of a certain family status or relationship.”).

While a long-distance sorting move leads to lost ties, the loss of these ties is considered a personal matter and is given no accounting by mobility measures. Enabling employment laws exist precisely to minimize linkages between employees and any particular employer or workplace, with no consideration for local strong ties. To the extent that facilitating laws—such as the Trade Act, tax deduction, and UI benefits—take into account lost social support upon a move, they do so only by providing relocation subsidies for the domestic family, replicating the underclustering of family law. While UI's clustering subsidy acknowledges the more significant cost of the clustering spouse's lost income, this loss is still related to employment and not social support.

Employment sorting laws fail to account for features of long-distance sorting that exacerbate its relationship costs. Sorting laws typically do not consider the sorter's likely duration in the new location, which means they fail to check the most costly form of long-distance sorting: repeated mobility.¹⁶⁷ Nor do sorting subsidies apply to moves to return to a location where strong ties already exist, unless these moves would independently meet the employment-related requirements. So, for example, if a spouse received UI benefits for a long-distance sorting move, and the couple wanted to return to their initial location (where they had a network of strong ties), the couple would receive these benefits only if one of the spouses had a qualifying job in the new location. Finally, employment-sorting laws fail to consider the magnitude of distance, even though longer moves are generally more costly in terms of lost strong ties. Sorting laws' only consideration of distance is a floor—typically, reasonable commuting distance.

Women, who rely more than men on strong ties, disproportionately bear the relationship costs that mobility measures ignore.¹⁶⁸ So mobility measures that facilitate only the mobility of the family cluster are more likely to allow men's primary source of support to accompany them. And for single mothers, the only strong ties that are part of the family cluster are their children. Women also spend more time than men developing and attending to the family cluster's strong-tie network, including the ties of parents and

167. An exception is the Trade Act, under which a worker is eligible for relocation assistance only with an offer of "employment affording a reasonable expectation of long-term duration." 19 U.S.C. § 2298(a)(2) (2006).

168. *See supra* notes 141–43 and accompanying text.

children.¹⁶⁹ This means that the loss of strong ties disproportionately imposes a loss to women's resources, and that the work of rebuilding a strong-tie network disproportionately imposes a tax on them.

b. Clustering and local strong ties. The loss of local strong ties upon a long-distance sorting move impacts the meaning of the family cluster, both for nuclear families and for singles. Viewing mobility measures in a dynamic fashion, mobility measures create a positive feedback loop that further strengthens the family cluster and weakens other strong ties. As people move to sort and cluster with their family units, their connections to other strong ties weaken, and they become increasingly dependent on the family cluster. As dependence on the family cluster intensifies, connections to others wither, making another move still more likely, and so on. In this way, mobility measures reinforce a hierarchy of strong ties that privileges the family cluster over other ties.

This positive feedback loop intensifies domestic family relationships. Reduction of strong-tie support in one form—community strong ties—is partially compensated by an increase in strong-tie support in another form—familial support.¹⁷⁰ From 1985 to 2004, Americans reported a marked decline in the number of people with whom they discussed meaningful matters.¹⁷¹ People reported fewer close relationships with coworkers, extended family members, neighbors, and friends.¹⁷² The family cluster has picked up the slack. Marriage was the only close relationship in which more people discussed important matters in 2004 than in 1985.¹⁷³ The number of people who depended entirely on a spouse for important conversations nearly doubled, from 5% to almost 10%.¹⁷⁴ As Professor Stephanie Coontz has written: “As Americans lose the wider face-to-face ties that build social trust, they become more dependent on romantic relationships for intimacy and deep

169. See Marybeth J. Mattingly & Suzanne M. Bianchi, *Gender Differences in the Quantity and Quality of Free Time: The U.S. Experience*, 81 SOC. FORCES 999, 1001 (2003) (discussing women's role as “the coordinators of family life” and their “activities on behalf of other family members . . . in building and maintaining social relationships and kinship ties”); see also ARLIE RUSSELL HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 35 (1989).

170. See Portes, *supra* note 143, at 11–12.

171. Miller McPherson et al., *Social Isolation in America: Changes in Core Discussion Networks over Two Decades*, 71 AM. SOC. REV. 353, 353–54 (2006).

172. *Id.* at 358–59.

173. *Id.*

174. *Id.* at 359.

communication, and more vulnerable to isolation if a relationship breaks down.”¹⁷⁵

Mobility measures may contribute to these dynamics. Providing for the portability of the family cluster but not other strong ties robs the family of support that helps it endure stressful events, and places more pressure on the spouses to compensate for the loss of those ties. This pressure may undermine the family cluster by overburdening the marital relationship—so much so that the cluster unravels.

By failing to provide for strong-tie support to join singles on a long-distance move, mobility measures impose relationship costs on singles. This may make sorting easier, as a single person only needs to consider one set of employment needs.¹⁷⁶ This is born out in data that younger people, who are more likely to be single, move more.¹⁷⁷ The flip side is that the single person’s most intimate relations will likely not come along. Mobility measures’ failure to acknowledge singles’ need for strong-tie support upon a move is still more salient given that today “emerging adulthood” is growing, and many Americans marry later (or not at all).¹⁷⁸

As friendship is given no accounting in mobility measures, it is not surprising that, even for singles, friends tend not to cluster over long distances.¹⁷⁹ Any person who moves to be nearer a friend risks that the friend, who herself will be subject to sorting and clustering dynamics, will up and move for a job, a marriage, or a spouse’s job. But even a proponent of the legal recognition of friendship, Ethan Leib, notes that “[t]he fact that many friendships dwindle . . . is not necessarily the symptom of a flawed friendship,” but rather a reflection of the fact that “[p]eople move away, get married, have kids, . . . change jobs.”¹⁸⁰ Leib takes the sensitivity of friendship to moves, job changes, and marriages as a given, rather than assessing the impact of law. While preferences and social norms undoubtedly play a role in these friendship dynamics, so too do mobility measures.

175. Stephanie Coontz, Op-Ed., *Too Close for Comfort*, N.Y. TIMES, Nov. 7, 2006, at A21.

176. Even those with children will have little limit on long-distance sorting except in the case of an objecting secondary parent, *see supra* notes 115–18, and even then, a move will often be permitted, *see supra* Part II.B.2.b.

177. *See* SCHACHTER, *supra* note 12, at 3.

178. Robin Marantz Henig, *The Post-Adolescent, Pre-Adult, Not-Quite-Decided Life Stage*, N.Y. TIMES MAG., Aug. 22, 2010, at 28, 30.

179. Friends and roommates are not categories of reasons for moves on the census. *See* SCHACHTER, *supra* note 12, at 12.

180. Leib, *supra* note 98, at 681 n.260.

B. Economic Costs

Employment sorting and the mobile labor market are prized for the efficiency gains they promise.¹⁸¹ To be sure, a geographically flexible labor market has been credited with lower unemployment rates, better labor-market matching and associated economic growth, and greater incentives for human capital investment.¹⁸² But this does not mean that sorting is an unmitigated good. As an initial matter, involuntary sorting necessitated by job loss can pose economic harm to employees. Still further, even for purely voluntary sorting, the economic consequences of long-distance sorting are more complicated.¹⁸³ Strong workplace ties, as well as the strong social ties discussed above, are a key part of individual and firm productivity, but they are not portable. The economic consequences of workplace and social strong-tie losses require consideration so that employment sorting can be optimized.

1. Local workplace ties and productivity

The conventional narrative of the benefits of sorting tends to focus narrowly on the wage benefits the employee accrues *at the time* of the job switch, and the gains the employer accrues at the time of hiring the new employee.¹⁸⁴ But returns to job tenure as compared with interfirm mobility may be higher than previously thought, and

181. See Leon H. Keyserling, *The New Deal and Its Current Significance in re National Economic and Social Policy*, 59 WASH. L. REV. 795, 801 (1984) (explaining that the sorting regime created by employment law is aimed at sustained optimal production and economic growth).

182. See *supra* notes 30–35. Note, however, that there is modest disagreement among economists even on topics related to this point, which is captured, for example, in questions about “place prosperity” versus “people prosperity,” and whether governments should invest in declining areas. Compare Robert Bolton, *Place Prosperity vs. People Prosperity Revisited: An Old Issue with a New Angle*, 29 URB. STUD. J. 185 (1992) (advocating for place-based investment based on the value of “sense of place”), with Edward Glaeser & Charles Redlick, *Social Capital and Urban Growth*, 32 INT’L REGIONAL SCI. REV. 264 (2009) (arguing that in theory, place-based investments are worthwhile if people are less likely to invest in social capital when they know an area is declining, but that the data show little evidence that decline is accompanied by lower social capital investment). Place-based investment is the minority position. See *id.* at 264.

183. See Lawrence E. Mitchell, *Structure As An Independent Variable in Assessing Stock Market Failures*, 72 GEO. WASH. L. REV. 547, 556 (2004) (citing relevant studies).

184. See Sylvia Fuller, *Job Mobility and Wage Trajectories for Men and Women in the United States*, 73 AM. SOC. REV. 158, 159 (2008) (“[T]he literature on the effect of mobility on wages concentrates on the short-term effects . . .”).

the role of workplace strong ties in enhancing productivity is likely a significant reason for this.¹⁸⁵

Strong ties promote worker productivity in a number of ways. Strong workplace ties provide access to information, which in turn brings access to power and opportunities, and the ability to coordinate complicated projects, all of which enhance performance.¹⁸⁶ Strong ties also contribute to resource sharing, which promotes productivity, innovation, and entrepreneurship.¹⁸⁷ Moreover, strong workplace ties are positively associated with affective commitment to the firm, which increases organizational citizenship behavior, firm loyalty, and willingness to give back to the firm.¹⁸⁸ Strong workplace ties, in the form of close friends and even “work wives” also provide emotional support and care that can contribute to performance.¹⁸⁹ In short, employees with strong

185. See Moshe Buchinsky et al., *Interfirm Mobility, Wages and the Returns to Seniority and Experience in the United States*, 77 REV. ECON. STUD. 972 (2010) (finding that the economic benefits of labor mobility may be overstated); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215, 2230 (1992) (discussing how economic activity productivity must be viewed within the context of social relations, and how “social relations themselves may influence the relative efficiency of . . . various courses of action.”) (internal quotation marks omitted) (quoting KEVIN J. DELANEY, STRATEGIC BANKRUPTCY, 56 (1992)).

186. See Noah E. Friedkin, *Informational Flow Through Strong and Weak Ties in Intraorganizational Social Networks*, 3 SOC. NETWORKS 273, 281 (1982) (addressing role of strong ties in conveying information in the workplace); Nancy B. Kurland & Lisa Hope Pelled, *Passing the Word: Toward a Model of Gossip and Power in the Workplace*, 25 ACAD. MGMT. REV. 428, 431–32 (2000) (discussing how passing workplace gossip among trusted strong ties can confer power); Jone L. Pearce & Amy E. Randel, *Expectations of Organizational Mobility, Workplace Social Inclusion, and Employee Job Performance*, 25 J. ORG. BEHAVIOR 81, 86 (2004) (noting that individuals with central positions in their work group’s advice network earn better performance ratings); see also Centola & Macy, *supra* note 131, at 707, 709–10 (When “collective behaviors involve complex contagions that require social affirmation or reinforcement from multiple sources,” the redundancy of strong ties “becomes an essential pathway for diffusion.”).

187. See Portes, *supra* note 143, at 3–4, 12.

188. See KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 95–96 (2004) (discussing the importance of affective commitment and extra-role behavior, known as organizational citizenship behavior, in productivity); Pearce & Randel, *supra* note 186, at 85 (explaining that strong ties lead employees to be more committed to the organization, more willing to work flexibly, more likely to subordinate their own goals to the organization’s needs and invest in firm-specific skills and knowledge, and more open to cost reduction and other organizational changes).

189. See CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 24 (2003) (“Working adults have more . . . conversations about things they consider important with co-workers than with anyone outside of their families.”); Sue Shellenbarger, *Do You Have a Work Spouse?*, WSJ.COM (Feb. 8, 2011, 10:16 PM), <http://blogs.wsj.com/juggle/2011/02/08/do-you-have-a-work-spouse> (reporting that in a survey of 640 white-collar workers, “[n]early two-thirds of workers have,

workplace ties “are more efficient than their peers, suffer less stress at the office, tend to stay at their jobs longer, and experience less job dissatisfaction.”¹⁹⁰

Strong workplace ties are perhaps even less portable than community ties. Strong work ties are premised on coworker relationships involving repeated interaction in the workplace.¹⁹¹ In the context of long-distance moves, not only will strong workplace ties no longer be coworkers, but they will also fall out of the mover’s local professional circle. Upon starting work in the second location, new employees, and especially those who move from afar, are considered “outsiders” who do not have the legitimacy to reap the benefits of strong ties.¹⁹² So the loss of strong workplace ties makes it harder to perform optimally in the new workplace, over at least the medium-term, until an employee can rebuild strong ties. Performance costs associated with the lack of strong ties are amplified with more frequent mobility.¹⁹³

Firms suffer not only because their long-distance sorted employees are without their strong workplace ties, but also because strongly tied employees collectively create networks with co-workers, customers, contractors, and consultants that benefit the firm. These networks allow firms to develop structurally embedded relations, which consist of an intricate web of routinized transactions that reduce transaction costs, saving time and money.¹⁹⁴ Employment sorting imposes the loss of a departing employee’s relationships and routines, and affords their new employers the opportunity to appropriate these routines.¹⁹⁵ These losses make employee turnover

or have had, a ‘work spouse’—a close co-worker of the opposite sex who shares confidences, loyalties and experiences”).

190. ETHAN J. LEIB, *FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT* 40 (2011).

191. See Shellenbarger, *supra* note 189 (explaining that this interaction can span intimate subjects as well as office talk).

192. See Ronald S. Burt, *The Gender of Social Capital*, 10 RATIONALITY & SOC’Y 5, 24 (1998).

193. Jeanne M. Brett, *Job Transfer and Well-Being*, 67 J. OF APPLIED PSYCHOL. 450, 457 (1982).

194. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 490 (1985); Frank P. Romo & Michael Schwartz, *The Structural Embeddedness of Business Decisions: The Migration of Manufacturing Plants in New York State, 1960 to 1985*, 60 AM. SOC. REV. 874, 879 (1995); Brian Uzzi, *Social Structure and Competition in Interfirm Networks: The Paradox of Embeddedness*, 42 ADMIN. SCI. Q. 35, 41–42 (1997).

195. See Griffin Toronjo Pivateau, *Preserving Human Capital: Using the Noncompete Agreement to Achieve Competitive Advantage*, 4 J. BUS. ENTREPRENEURSHIP & L. 319, 328–

and training costly for firms.¹⁹⁶ While a firm might still benefit from its connections to a former employee, especially one who stays in the same industry, through referrals and the like, these benefits diminish when an employee is no longer in the firm's local professional community.¹⁹⁷ Moreover, the hiring of an "outsider," especially one from far away who likely has no ties in the workplace, may undermine trust in the new firm.¹⁹⁸

Employment sorting laws may themselves create expectations about the need to be mobile that undermine the motivation to develop strong workplace ties, and, in turn, individual and organizational productivity.¹⁹⁹ Employees who anticipate long-distance sorting will invest comparatively less in building strong ties in the workplace and in a location where they do not plan to remain and will place less importance on job tasks that are not consistent with their expectations for mobility.²⁰⁰ So if an employee plans to move, she might not spend as much time chatting by the water cooler, even though this could build coworker trust that would aid in completing future projects.

2. Local social ties and productivity

The loss of strong social ties and the pressure on the family cluster that result from the current regime of sorting and clustering also hinder productivity, thus interfering with the economic goals of mobility measures. Issues regarding strong-tie social support—"self and spouse losing social ties, moving away from family and friends, and establishing new relationships at work"—have been reported as the most stressful aspects of a work-related move.²⁰¹ The loss of these strong ties, and the stress associated with it, can affect an employee's ability to acclimate to a new workplace and perform well there.²⁰² For married couples, the family cluster is the only cushion for the

29 (2011).

196. See *id.* at 326–29; Buchinsky et al., *supra* note 185, at 975.

197. See Bolton, *supra* note 182, at 193–94 (discussing altruism and trust that arises in local labor markets).

198. Burt, *supra* note 192, at 24.

199. See *id.* at 19; Portes, *supra* note 143, at 6.

200. Cf. Kurland & Pelled, *supra* note 186, at 435–36.

201. Anthony G. Munton, *Job Relocation, Stress and the Family*, 11 J. ORG. BEHAV. 401, 405 (1990).

202. See *id.*; Brett, *supra* note 193, at 452; Peter Pardine et al., *Job-Stress Worker-Strain Relationship Moderated by Off-The-Job Experience*, 48 PSYCHOL. REP. 963, 968 (1981).

spouse and her domestic family. For others, this means potentially all strong ties are lost.

Lost strong social ties impose opportunity costs for productivity. More time must be spent arranging for and providing care than on other productive work. This is hard enough with commercial care arrangements. But certain forms of care that are more difficult to purchase—care for a sick child, after-hours care—might fall directly on parents who have not yet established strong ties to help in a pinch.²⁰³ This makes balancing work and family even more difficult after a long-distance move, sometimes at the expense of work.²⁰⁴

For those moving with others, productivity may suffer due to the consequences of the move on other members of the family cluster. The stress of relocation is much greater for individuals whose spouses need to find jobs in the new location.²⁰⁵ Those who move alone, on the other hand, may be particularly affected by the loss of strong-tie support the move induces. For singles, a long-distance sorting move will mean that at least initially they may be without any local strong ties. This lack of support can lead to feelings of isolation that interfere with work productivity.²⁰⁶ Moreover, the lack of strong ties may mean that a transplanted single person will want to invest additional time and energy building strong bonds. But she may have a hard time balancing this desire with work demands, because time to develop friendships and even date (the gateway to marriage, after all), is generally not considered a legitimate reason for work flexibility (even less so than caregiving).²⁰⁷

203. See Joan E. Starker, *Psychosocial Aspects of Geographic Relocation: The Development of a New Social Network*, AM. J. HEALTH PROMOTION 52, 52 (1990) (finding minimal social support months after a move).

204. See Martha Wiggins Frame & Constance L. Shehan, *Work and Well-Being in the Two-Person Career*, 43 FAM. REL. 196, 196 (1994) (discussing how relocation stress increases with the pile-up of demands associated with a move, with a greater negative impact on wives than husbands).

205. Munton, *supra* note 201, at 403.

206. See Peter H. Schuck, *The Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 888 (2008) (noting how co-locating family members can support a worker's productivity upon a move); Starker, *supra* note 203, at 52 (finding lack of support and isolation after a move).

207. See Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, And How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1766–67 (2001) (discussing perceptions of caregiving as more significant than other employee interests).

3. *Mobility measures and economic costs*

To the extent that sorting causes economic costs for long-distance movers, relocation subsidies and benefits are meant to offset these costs. But the costs employment sorting laws offset are aimed at the tangible costs at the initial sorting moment—relocation expenses for the individual and the family, the portability of health insurance, and partial wage replacement for a spouse. There is little consideration of longer-term economic costs for employees and employers in terms of lost strong workplace ties. Sorting laws fail to consider factors that exacerbate the economic costs of long-distance sorting: frequency of mobility, distance of move (other than creating a floor), and whether there are strong ties in the destination location.²⁰⁸ And the cushion that family law provides to insure against strong-tie losses—the family cluster—fails to insure against all of the local strong-tie losses that matter for productivity. For example, despite the significance of workplace relationships, the law treats work spouses (and other strong workplace ties) and legal spouses in opposite manners—one is switched as a function of sorting, and the other is maintained as a function of clustering. The failure to recognize important workplace relationships is both cause and effect of the mobile employee: because these relationships are not recognized, employees have an easier time sorting, and as employees increasingly sort, these relationships are further weakened. In these ways, sorting and clustering fail to account for the loss of strong ties bound up in relationships outside the family cluster, the investments necessary to rebuild these strong ties, and the impact this has on productivity.²⁰⁹

While lost strong workplace and social ties impose real economic costs, stasis can breed stagnation. New ties can inspire new ways of thinking.²¹⁰ Groups that are too tightly knit may exclude outsiders, which may make it harder for long-distance sorters to integrate into the firm.²¹¹ My point, then, is not that mobility undermines productivity writ large, but that there are underappreciated costs of mobility that could be better addressed by the legal regime of sorting and clustering.

208. See *supra* Part III.A.2.

209. See Burt, *supra* note 192, at 11.

210. Richard Florida, *Cities and the Creative Class*, 2 CITY & CMTY. 3, 6 (2003).

211. See Burt, *supra* note 192, at 15 (discussing the link between ties and workplace success and the challenges outsiders face at work).

C. Sorting and Clustering Decisions

Determining when long-distance sorting is welfare maximizing is a difficult proposition. Heterogeneity in the role of strong ties in people's lives and in whether any particular move brings the movers closer to or further from beneficial or burdensome ties means that the benefit-burden calculus must often proceed on a case-by-case basis. Individuals likely have the best information about the welfare effects of strong ties and mobility on their lives. Nonetheless, people have been known to err in predicting the welfare effects of their decisions.²¹² And there are reasons to believe that employees and employers systematically err in weighing the costs and benefits of long-distance mobility due to cognitive biases and information deficits that lead to overestimating the benefits of mobility and underestimating its costs.

On the employee side, optimism bias—the tendency to be overly optimistic about the outcome of our actions²¹³—combined with focalism—the tendency to focus on the main event rather than background details that are equally or more significant²¹⁴—lead people to overestimate their ability to bring about personally desirable events, because they fail to correct for unknown or unpredictable details of future situations, even though those details matter a lot.²¹⁵ The variety of unknown and unpredictable details upon a long-distance move, including those related to a new job and a new community, among others, may tend to lead to undue optimism about long-distance sorting moves.²¹⁶

These biases may be further skewed in the case of long-distance sorting due to salience bias and weighting errors—the tendency to weigh concrete and easily comparable factors more heavily than diffuse and incommensurable factors.²¹⁷ In the mobility context, this

212. David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 334 (Thomas Gilovich et al. eds., 2002) (finding optimism bias in a range of contexts).

213. *Id.*; Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 *J. PERSONALITY & SOC. PSYCH.* 806, 806 (1980).

214. See David Dunning et al., *Flawed Self-Assessment: Implications for Health, Education, and the Workplace*, 5 *PSYCH. SCI. PUB. INTEREST* 69, 72, 77 (2004).

215. *Id.* at 76.

216. See *id.*

217. Salience bias means that people tend to focus on factors that are more prominent, immediate, and easier to process. See Deborah Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 *YALE J. ON REG.* 253, 261–63 (2011).

means that people might value the more concrete employment gains derived from long-distance sorting (salary, title, etc.) than the more abstract losses (changes in personal relationships, etc.).²¹⁸ These types of weighting errors are observed with the commuter paradox, which is the label for the substantially welfare-reducing decisions people make about commuting, due to overvaluing the concrete benefits of positional goods such as a larger house, as compared with the diffuse losses of nonpositional goods such as traffic-induced aggravation.²¹⁹ Given similar trade-offs between positional and nonpositional goods at stake in the mobility context, similar weighting errors might be expected to compromise sorting decisions. Hedonics research shows that these types of weighting errors can seriously undermine welfare calculations, because it is nonpositional goods like spending time with strong ties (precisely what we lose with a long-distance move) that have a greater impact on happiness than making more money.²²⁰ To be sure, there may be biases that cut the other way, e.g., the status quo bias,²²¹ but on balance, the biases and weighting errors involved in mobility decision making should at least give us pause about decisions in this area.

218. See Daniel Kahneman & Amos Tversky, *Values, Choices, and Frames*, 39 AM. PSYCHOL. 341, 344–46 (1984).

219. There is an observed tendency to overvalue positional goods like money and real estate and undervalue nonpositional goods like social connections and walking to work. See Alois Stutzer & Bruno S. Frey, *Recent Advances in the Economics of Individual Subjective Well-Being*, 77 SOC. RES. INT'L Q. 679, 700–01 (2010). One Swiss study found that to move from no commuting time to twenty-two minutes of commuting time (each way), an individual requires an additional monthly income of approximately 470 Euros (or 35.4% of the average monthly income) to compensate for lost welfare. Alois Stutzer & Bruno S. Frey, *Stress that Doesn't Pay: The Commuting Paradox*, 110 SCANDINAVIAN J. OF ECON. 339, 355 (2008). These are not the patterns observed. *Id.*

220. See Jon Bronsteen et al., *Hedonic Adaptation and the Settlement of Lawsuits*, 108 COLUM. L. REV. 1516, 1527 & n.56 (citing the economist Richard Easterlin for findings about “how quickly people adapt to increases in income due to concomitant changes in aspirations and how slowly they adapt to nonpecuniary benefits like family life”).

In particular, people make decisions assuming that more income, comfort, and positional goods will make them happier, failing to recognize that hedonic adaptation and social comparison will come into play, raise their aspirations to about the same extent as their actual gains, and leave them feeling no happier than before. As a result, most individuals spend a disproportionate amount of their lives working to make money, and sacrifice family life and health, domains in which aspirations remain fairly constant as actual circumstances change, and where the attainment of one's goals has a more lasting impact on happiness. Hence, a reallocation of time in favor of family life and health would, on average, increase individual happiness.

Id. at 1527 n.56 (internal quotation marks omitted) (quoting Richard A. Easterlin, *Explaining Happiness*, 100 PROC. NAT'L ACAD. SCI. 11,176, 11,182 (2003)).

221. See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003).

On the employer side, firms are also subject to limitations in decision making, including biases and information deficits, that may lead to suboptimal sorting-related decisions, including a failure to appreciate the productivity costs associated with long-distance sorting moves or the benefits of providing relocation accommodations. Due to salience bias, job qualifications listed on a resume and accessible in an interview will loom far larger than the typically unknown factors of the ability of a long-distance sorting employee (and her family) to adjust after a long-distance move.²²² Employers' sorting-related decision making deficits may be especially problematic in the context of social strong ties. Focalism means that employers may wrongly pay little heed to what they consider "personal" matters outside the scope of the employment relationship.²²³

Information asymmetries related to social strong ties also play a role.²²⁴ Employers may be reluctant to raise personal questions to applicants or new hires that may cross professional and legal boundaries.²²⁵ This means that "boundedly rational"²²⁶ managers are unlikely to have the information necessary to determine the costs of hiring long-distance sorters for productivity and morale or the benefits of providing relocation support for retention and integration.²²⁷ It also means that employers' implementation of efficient relocation support is largely dependent on individual employee requests.²²⁸ Not every employee who would benefit from such support asks for it for fear that she will signal she is a "lemon": an employee who is overly involved with her personal life and not

222. See *supra* note 217.

223. See Schoenbaum, *supra* note 70, at 134.

224. Cf. J.H. Verkeke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903, 911 (2003) (discussing inefficient hiring decisions resulting from information asymmetries about employee disabilities).

225. CONN. GEN. STAT. § 46a-60(a)(9) (2009) ("It shall be a discriminatory practice . . . to request or require information from an employee . . . relating to . . . the individual's familial responsibilities . . ."). Anti-discrimination law limits employers' ability to inquire about prospective employees' personal circumstances. See, e.g., Schoenbaum, *supra* note 70, at 104, 133 (discussing these laws and their construction of the boundaries of the employment relationship).

226. See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214 (1995) (explaining that "human rationality is normally bounded by limited information and limited information processing").

227. See, e.g., Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1102 (2010) (discussing this problem in the context of caregiving accommodations).

228. See *id.* at 1100.

fully committed to work.²²⁹ Indeed, although in dual-income families the clustering spouse's work in the new location is critical to family adjustment, in one study fewer than one-fifth of clustering spouses reported that they received adequate support securing employment from the sorting spouse's employer.²³⁰

IV. DISTRIBUTIONAL CONSEQUENCES OF MOBILITY MEASURES

For married couples, long-distance sorting moves typically involve a relative distribution of sorting and clustering: one spouse sorts, and one spouse clusters. The sorting spouse—whose employment drives the move—benefits from sorting. While the sorting spouse may go from strong ties to weak workplace ties, the clustering spouse will go from strong to even weaker or perhaps no workplace ties, without offsetting sorting benefits. At the same time that the clustering spouse might not benefit from sorting, she might also provide more of the cushioning the family cluster insures. These distributional consequences fall along gender lines—husbands sort, and wives cluster—and contribute to the unequal economic circumstances of men and women, both inside and outside marriage.

A. Sorting Without Clustering and Clustering Without Sorting

When dual-income married couples (the vast majority of married couples)²³¹ move long distances for employment sorting purposes, the spouses typically do not both accrue employment advantages. Unless the maximum sorting position for each spouse is in the same location at the same time, one spouse will need to compromise on employment (by moving and giving up a job or staying and foregoing an opportunity).²³² In such circumstances, employment

229. See Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1958–59 (1996) (discussing the problem of negative signaling in the context of requesting a just-cause termination provision in an employment contract).

230. PERMITS FOUNDATION, INTERNATIONAL SURVEY OF EXPATRIATE SPOUSES AND PARTNERS 20–22 (Nov. 2009), *available at* http://www.permitsfoundation.com/docs/permits_survey_final_report.pdf (finding in survey of spouses on international assignment that those who worked were more likely to report a positive impact on adjustment, family relationships, and health and well-being).

231. See ROSE M. KREIDER & DIANA B. ELLIOTT, U.S. CENSUS BUREAU, AMERICA'S FAMILY AND LIVING ARRANGEMENTS: 2007, at 10 (2009).

232. Interestingly, family law in other countries may permit the intact family to submit location decisions to a court. In Spain, for instance, married couples with children can seek judicial resolution of a disputed relocation decision. See Max Rheinstein & Mary Ann Glendon, *Interspousal Relations*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 12–13

sorting and family clustering conflict: the sorting positions for each spouse may be in different locations, but the cluster requires them to remain together. Alternatives to locating the spouses' employment in the same location—long-distance marriage and long-distance commuting—pose their own significant costs.²³³

The tradeoffs required between spouses by this conflict of sorting and clustering can be stark. While moving for even the sorting spouse destroys economically relevant strong ties, it also typically provides economic benefits, as well as an opportunity to recreate these ties over time. Because the clustering spouse does not typically enjoy employment benefits from sorting, and may be unemployed in the new location, her opportunities to regenerate economically relevant strong ties are further hampered. In addition, relocating multiple times to “trade off” on career opportunities is not a strategy that can be easily employed. Moving is expensive, not only because of relocation costs, but because of the mobility frictions that are the subject of this Article.

Employment sorting focuses on individual employees, not on two employees—spouses—who are geographically tied. In providing no protections via at-will employment, sorting can happen regardless of the sorting of a spouse (think of a mandatory transfer), in contrast to a regime of contract employment in which couples could try to negotiate compatible contracts. Because of singular sorting, married couples must decide who benefits from the unequal sorting that results from long-distance moves.

On the flip side, family clustering, which provides some social-tie cushion for the family, does not account for enhanced sorting on the part of the sorting spouse, which often results in enhanced clustering on the part of the clustering spouse (i.e., a shift of more of the support role the family provides to this spouse).²³⁴ Therefore, assigning the sorting role to one spouse often results in assigning additional clustering responsibilities resulting from a long-distance move to the other spouse. The sorting spouse not only benefits from sorting, but, by taking on the role of the primary worker, is also less burdened by insufficient family clustering. Indeed, it is precisely the strong-tie insurance that the family cluster provides that eases the

(Chloros ed., 1980).

233. See *infra* Parts V.B, V.C.

234. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 32–36 (2000) (describing the primary/secondary worker dynamic, and how carework is shifted to the secondary worker).

consequences of strong-tie losses for sorting spouses. But instead of clustering benefits to match the sorting benefits for her spouse, the clustering spouse faces deficits through the loss of strong ties caused by underclustering. In this way, the limitations of sorting and clustering further skew the distribution of sorting and clustering within a marriage.

UI benefits for clustering spouses only partially address this conflict between employment sorting and family clustering. The benefits do not fully replace income, nor do they compensate for lost firm-specific human capital or strong workplace ties. Partial wage replacement may afford an opportunity for more rigorous job search in the new location.²³⁵ But by only compensating for some of the lost opportunity to sort, and by failing to provide any clustering support, the law fails to compensate the full range of losses the clustering spouse faces.

Over time, the relative distribution of sorting and clustering becomes more lopsided. Marriage involves repeat bargaining: “the winner[] in one round get[s] a satisfactory outcome that would typically include not only more immediate benefit but also a better placing (and greater bargaining power) in the future.”²³⁶ When the sorting spouse drives the move, she will accrue disproportionate gains to career, while the clustering spouse will accrue disproportionate losses. This makes it more likely that the sorting spouse will drive the next move, and so on. While the initial gap may be small, it can grow quite wide over time, and trading off will become less likely. This places pressure on role specialization in marriage, casting some doubt on the prospects for egalitarian marriage with equally shared responsibilities in the home and the market.

B. The Relative Distribution of Sorting and Clustering

In married couples, husbands tend to sort, and wives tend to cluster. Husbands’ jobs are more likely to determine residential location, and wives are more likely to leave a job to accommodate a partner’s job change.²³⁷ This makes wives more likely to be “tied

235. See Lester, *supra* note 86, at 342–43.

236. See Amartya Sen, *Gender and Cooperative Conflicts*, in PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT 123, 137 (Irene Tinker ed., 1990) (“Finding a more ‘productive’ employment . . . may . . . contribute not only to immediate well-being, but also to acquired skill and a better breakdown position for the future”).

237. See SUSAN HANSON & GERALDINE PRATT, GENDER, WORK, AND SPACE 105, 126–27 (1995).

movers.”²³⁸ On the flip side, married women are less likely to relocate for enhanced employment opportunities, perhaps because their husbands are differentially willing to relocate for their wives’ careers.²³⁹ This makes wives more likely to be “tied *stayers*.”²⁴⁰

This results in dramatic income differentials between husbands and wives. Whereas long-distance mobility boosts the career development of married men, for married women, mobility is accompanied by lower rates of employment and income growth.²⁴¹ When couples move, the income gap between husbands and wives increases significantly, on average to the tune of nearly \$3,000.²⁴² In fact, the impact of mobility is similar to the birth of a child on husbands’ and wives’ relative earnings.²⁴³

Economists have proposed that family sorting decisions are determined by comparative advantages in human capital—i.e., sorting decisions will favor the partner who has the comparative advantage in market labor at the outset²⁴⁴—or by favorable changes in net family income—i.e., sorting decisions are based on the sum total of gain of income for one partner and loss of income for the other partner.²⁴⁵ But differences in human capital investments and income do not tell the whole story, suggesting that gender itself is a significant factor in determining the relative distribution of sorting and clustering. Married couples give priority to husbands’ careers and enhanced earnings in making relocation decisions, even controlling for the effects of human capital investments.²⁴⁶ Wives’ earning potential has little influence on the effect of mobility on employment, and, unlike men, mobility decreases their likelihood of employment.²⁴⁷ Indeed, women who are most committed to work—

238. Joy E. Pixley & Phyllis Moen, *Prioritizing Careers*, in *IT’S ABOUT TIME* 183, 184 (Phyllis Moen ed., 2003) (emphasis added).

239. *Id.* at 186.

240. *Id.* at 184 (emphasis added).

241. Kimberlee A. Shauman & Mary C. Noonan, *Family Migration and Labor Force Outcomes: Sex Differences in Occupational Context*, 85 SOC. FORCES 1735, 1735 (2007).

242. *Id.* at 1748 (finding that moving tends to increase the annual earnings gap between husbands and wives by an average of \$2,680).

243. See Thomas J. Cooke et al., *Longitudinal Analysis of Family Migration and the Gender Gap in Earnings in the United States and Great Britain*, 46 DEMOGRAPHY 150 (2009).

244. GARY S. BECKER, *A TREATISE ON THE FAMILY* 57 (1981).

245. Jacob Mincer, *Family Migration Decisions*, 86 J. POL. ECON. 749, 750 (1978).

246. See Shauman & Noonan, *supra* note 241, at 1735 (rejecting human capital theory based on findings that equalizing the distribution of human capital between married men and women would not lead to a more equal distribution of the returns to mobility).

247. *Id.*

those who work more than full time and those with nonworking husbands—face the greatest income penalty from family mobility.²⁴⁸ Therefore, gender, apart from purely economic calculations, plays a significant role in relocation decisions. To the extent that gender trumps human capital investments and earning potential in sorting and clustering decisions, this compromises not only gender equality, but also efficient employment sorting and is another way in which sorting and clustering decisions may not be welfare maximizing.²⁴⁹

While UI benefits for clustering spouses were instituted to ease these gendered sorting/clustering dynamics, and in particular, to “help women,”²⁵⁰ it is not clear whether subsidizing, and thereby incentivizing these gendered moves, without adequate sorting or clustering support or compensation, is to women’s benefit. If gender drives relocation decisions despite efficiency, as research suggests, there is less reason to be concerned about these incentive effects, as husbands’ careers may dictate family relocation decisions regardless of UI benefits.²⁵¹

The gendered distribution of sorting and clustering may go a long way towards explaining the ongoing gender wage gap. The clustering spouse’s employment prospects in the new location may be limited.²⁵² Even an initially small income gap grows over time and as a result of additional long-distance moves.²⁵³ And gender differentials in sorting and clustering become even more problematic following a divorce. After years of the husband sorting and the wife clustering, the income gap, exacerbated by these mobility measures, may not be compensated upon divorce.²⁵⁴

Employment exit (or threat of exit) may have a different signaling function to employers based on gender. It is often assumed

248. *Id.* at 1755.

249. See *supra* Part III.C for a discussion of shortcomings in such decisions.

250. H.R. REP. NO. 110-414, pt. 1 at 72 (2007) (requiring benefits “would particularly help women, who are . . . more likely to need to leave work . . . [to] follow[] a spouse”).

251. See *infra* Part V.A.2 for further discussion of incentive effects.

252. See Shauman & Noonan, *supra* note 241, at 1745 (compared to immobile wives, those who move are 22% less likely to remain employed across any one-year interval, and their earnings grow by 760 fewer dollars). Of course the clustering spouse may place limits on relocation for her own employment purposes. For example, she might refuse to move without a job lined up in the new location.

253. See Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency and Social Change*, 103 YALE L.J. 595 (1993).

254. See Joan C. Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2247 & n.91 (1994) (discussing how temporary alimony fails to account for gendered market labor and carework dynamics within marriage).

that “[m]en can change jobs, because the presumption is that they are ‘moving up,’ and all rational employers want talented, ambitious workers, even if they sometimes lose them.”²⁵⁵ If women sort, however, “the inference might not be so much that they were talented and ambitious, like men, but rather than they had to follow their husband around. A rational firm would be wary of hiring someone who might move for reasons it could not know or control.”²⁵⁶ And given that women are more likely to be tied stayers, employers may believe that they don’t need to “match higher wage opportunities available in distant locations” for women employees, contributing to the gender wage gap.²⁵⁷

These gendered sorting and clustering dynamics may also create preemptive anti-sorting effects for women. Although Title VII bars sex discrimination in employment, employers may be less likely to consider women for positions that require relocation.²⁵⁸ The recent sex-discrimination class action against Wal-Mart was based in part on the company’s requirement that sales associates be willing to relocate for promotions.²⁵⁹ The dissent noted the risk “that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men.”²⁶⁰

Gendered sorting and clustering dynamics may even contribute to gender differences in initial career choices, with a corresponding impact on the wage gap. One of the defining features of the U.S. labor market is occupational segregation by sex. Approximately one-third to 40% of employed women would have to switch occupational categories to replicate the male occupational distribution pattern.²⁶¹ This is a distinction with a difference for mobility purposes: the “pink collar” jobs largely populated by women tend to be geographically ubiquitous—that is, they can be done anywhere.²⁶²

255. EDWARD J. MCCAFFERY, *TAXING WOMEN* 259 (1997).

256. *Id.* Although federal law bars hiring discrimination on the basis of sex, it still occurs with frequency. See Schoenbaum, *supra* note 70, at 125–26.

257. William T. Bielby & Denise D. Bielby, *I Will Follow Him: Family Ties, Gender-Role Beliefs, and Reluctance to Relocate for a Better Job*, 97 AM. J. SOC. 1241, 1241 (1992).

258. DEP’T OF LAB., FEDERAL GLASS CEILING COMMISSION, *GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL* 151 (1995) (reporting that women are not asked to relocate as frequently as men).

259. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2563 (2011) (Ginsburg, J., dissenting).

260. *Id.*

261. Michael Ransom & Ronald L. Oaxaca, *Intrafirm Mobility and Sex Differences in Pay*, 58 INDUS. & LAB. REL. REV. 219, 220 (2005).

262. Some examples are school teachers, nurses, and secretaries. See Shauman & Noonan,

The geographic ubiquity of women's occupations assists in family clustering, because women's employment can be less of a drag on their husbands' sorting preferences.²⁶³ But this flexibility comes with a cost: these geographically ubiquitous jobs pay less.²⁶⁴ Occupational segregation affects married and single women alike. So traditional economic theories of family relocation may have it exactly backwards—it is not that women trail because they earn less; women may earn less because they expect (or are expected) to trail.²⁶⁵

V. MOBILITY MODIFICATIONS

Mobility for sorting purposes has generally been recognized as an unmitigated good. While mobility may have significant benefits, the relationship and economic costs, as well as the distributional consequences, imposed by employment sorting in light of family clustering complicate this story. Determining the optimum level of mobility and whether we are currently above or below that optimum level is beyond the scope of this Article. This Part nonetheless tries to make progress not primarily by adjusting mobility levels, but instead by suggesting three principal ways to adjust sorting and clustering to provide better support upon a move and to recognize strong ties outside of the nuclear family: (1) recalibrating employment sorting, (2) recalibrating family clustering, and (3) exploring the agglomeration benefits of cities as a way to mitigate sorting and clustering costs by providing more job opportunities in one place. These ideas are not meant to put an end to mobility, but to allow for better sorting and clustering decisions, and to alleviate some of mobility's costs and distributional burdens while enhancing its benefits.

supra note 241, at 1738–39.

263. Larry H. Long, *Women's Labor Force Participation and the Residential Mobility of Families*, 52 J. SOC. FORCES 342, 348 (1974).

264. Women earned 75% of what their male counterparts earned in 2009, U.S. DEP'T. OF COMMERCE, WOMEN IN AMERICA 7 (2011), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf. Some proportion of the pay gap is attributable to occupational segregation. See Paula England, *Gender Inequality in Labor Markets: The Role of Motherhood and Segregation*, 12 SOC. POL. 264, 276 (2005).

265. Janice Compton & Robert A. Pollak, *Why are Power Couples Increasingly Concentrated in Large Metropolitan Areas?*, 25 J. LAB. ECON. 475, 479 (2007) (collecting studies consistent with this effect, and noting that in light of expectations of clustering, "women may tend to enter more mobile careers").

A. Recalibrating Employment Sorting

Recalibrating employment sorting through adjustments to at-will employment or laws that eliminate barriers to sorting would be overbroad because these laws reach far beyond sorting. A better approach would be to adjust the costs of sorting for both employers and employees. The goal of these adjustments is to improve employer and employee sorting decisions, to incentivize employers to internalize some of the costs of sorting, and to provide better support to offset the costs of sorting.

1. Recalibrating sorting costs for employers

Making hiring long-distance sorters relatively more expensive for employers would internalize some of the costs of sorting on non-sorting parties. Employers will then take steps to avoid long-distance sorting when the employer could achieve the same result with nearby workers and rely on sorting only when the benefits exceed the recalibrated costs. Placing a modest cost on long-distance sorting could offset employers' shortcomings in decision making that lead them to underestimate the productivity costs of sorting.²⁶⁶ While employers share some of the productivity costs of lost strong ties,²⁶⁷ they also accrue benefits from long-distance sorting²⁶⁸ and so should also internalize the costs. Moreover, the employer is the least cost avoider for optimizing sorting.²⁶⁹ The firm is in the best position not only to know when sorting is necessary for its business purposes, but also to implement measures that would integrate employees into the workplace and the community.²⁷⁰ Employers are also easier targets than individuals for de-biasing efforts.

A direct measure to adjust the relative costs of sorting would make it more expensive for employers to hire long-distance sorters as compared with local employees. Many areas of employment law rely on the distinction between "local" and "non-local" workers, defined by whether the employee lives within a "reasonable commuting

266. See *supra* Part III.C.

267. See *supra* Part III.B.1.

268. See *supra* Part II.A.

269. See, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 205–06 (7th ed. 2007) (explaining that when harm can be avoided by more than one actor, the lowest-cost harm avoider should do so, since that will best avert the harm).

270. See Kevin J. Coco, *Beyond the Price Tag: An Economic Analysis of Title III of the Americans with Disabilities Act*, 20 KAN. J.L. & PUB. POL'Y 58, 92 (2010).

distance” of her job.²⁷¹ The UI experience-rating system could require increased employer contributions based on the number of long-distance sorters the employer hires. The funds generated could go to providing the employer contribution breaks or benefits to long-distance sorters suggested below.²⁷² To the extent that these costs are passed through to sorters in the form of lower wages, this is not necessarily undesirable, as this could internalize the costs that sorters now impose on their communities. The UI scheme is a natural home for these requirements because it is meant to address macroeconomic issues of labor supply and demand, including employment sorting.²⁷³ Any constitutional problems with local hiring preferences will be limited to public employers.²⁷⁴

2. Recalibrating sorting costs for employees

Facilitating laws that provide subsidies to offset the costs of sorting also incentivize precisely that costly behavior. The challenge of avoiding a moral hazard that arises when, as in the case of moving, a beneficiary can control eligibility for benefits, is a stubborn problem in the law.²⁷⁵ The seemingly elusive goal here would be to provide needed support for those who would make moves but for the subsidy without incentivizing additional moves. There is insufficient data on the incentive effects of sorting subsidies that would permit a conclusive analysis of the trade-offs of incentive effects with the need for support.²⁷⁶ In time, state-by-state implementation of UI benefits for clustering spouses will provide a natural experiment across states with and without these benefits,

271. See, e.g., 20 C.F.R. § 639.5(b)(3) (explaining that “reasonable commuting distance” will vary with local and industry conditions,” and that “consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time”).

272. See *infra* Part V.A.2.

273. See Lester, *supra* note 86, at 342–43.

274. See Keaton Norquist, *Local Preferences in Affordable Housing: Special Treatment For Those Who Live or Work in a Municipality?*, 36 B.C. ENVTL. AFF. L. REV. 207, 209, 214–21 (2009).

275. See Lee Anne Fennell, *Relative Burdens: Family Ties and the Safety Net*, 45 WM. & MARY L. REV. 1453, 1503–06 (2004) (discussing the “controllability” problem in providing benefits for dependence support); Kenneth J. Arrow, *Insurance, Risk, and Resource Allocation*, in 4 COLLECTED PAPERS OF KENNETH J. ARROW: THE ECONOMICS OF INFORMATION 77, 85 (1984) (defining “moral hazard” as when “[t]he insurance policy might itself change incentives and therefore the probabilities upon which the insurance company has relied”).

276. See generally Ernie Goss & Chris Paul, *The Impact of Unemployment Insurance Benefits on the Probability of Migration of the Unemployed*, 30 J. REG. SCI. 349 (1990) (discussing conflicting data on whether UI benefits increase or decrease mobility).

with data ripe for study.²⁷⁷ Until such data is available, there are other ways to think about the problem.

The purpose of sorting subsidies is to offset some of the costs of sorting. In particular, UI benefits for clustering spouses partially offset lost wages. Although these benefits are paid to the clustering spouse, they increase household income, and may accrue to the benefit of more than just the clustering spouse.²⁷⁸ To the extent the financial impact of a spouse's job loss on the family is alleviated by these benefits, the clustering spouse's power in bargaining over the relocation is reduced. However, UI benefits provide income that may permit a more prolonged search to enhance job opportunities in the new location.²⁷⁹ While the benefits of needed support may outweigh the incentive effects,²⁸⁰ cash subsidies could be adjusted to reduce incentives for more costly moves by incorporating a form of experience rating so that benefits are decreased as the number of moves increases above a threshold,²⁸¹ or by providing a bonus payment for moves close to strong ties.²⁸²

Although cash subsidies are generally thought to be more efficient,²⁸³ alternative mechanisms may better mitigate incentive effects. In-kind subsidies in the form of sorting accommodations in the new location could do so by trading on biases related to sorting. Because sorters do not fully appreciate sorting consequences *ex ante*,²⁸⁴ they also would be unlikely to appreciate fully the value of

277. Such comparisons across states have been conducted on the effects of minimum wage on employment levels. *See generally* David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772 (1994).

278. Who receives the household benefits may matter for how the benefits are allocated among members of the household. Jackie Goode et al., *Findings: Distribution of Income Within Families Receiving Benefits*, JOSEPH ROWNTREE FOUNDATION (1998), available at <http://www.jrf.org.uk/sites/files/jrf/spr468.pdf> (finding that benefits paid directly to mothers are more likely to be spent in ways that benefit children or the family as a whole than if they go to fathers). To the extent that mothers are more willing to sacrifice benefits and expend them on others, this suggests that mother clustering spouses may be less likely to expend UI benefits in ways that will enhance their opportunities—*e.g.*, interview attire, career coaching, etc., defeating some of the purpose of UI benefits.

279. *See* Lester, *supra* note 86, at 342.

280. *See supra* Part IV.B on gender and incentive effects.

281. *See* Fennell, *supra* note 275, at 1505 (noting experience rating as a mechanism to correct moral hazard).

282. *See infra* Part V.B.2 on corrective mobility.

283. Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 230 (2004) (“[G]enerally speaking, in-kind subsidies are thought of as less efficient than cash subsidies because the recipient may only use the in-kind subsidy for specified purposes.”).

284. *See supra* Part III.C.

this subsidy *ex ante*, making incentive effects less likely as well. This means in-kind benefits can be calibrated to provide additional support to individuals and families who make moves that impose greater costs—repeated moves, longer distance moves, and moves to locations where there are no strong ties—with less concern about further incentivizing these moves.²⁸⁵ To the extent that sorting accommodations integrate newcomers into the community, they act as universal programs promoting strong ties for all, which are likely to garner broader support.²⁸⁶ To the extent that cash subsidies might be appropriated for other household uses,²⁸⁷ in-kind benefits assure their use for the clustering spouse. Finally, some of the strong-tie losses that sorters experience cannot easily be replaced in the market and can be better provided through in-kind organizational efforts, whether by public entities or employers, aimed at creating communities.

In-kind relocation assistance could be publicly provided, or incentives could be implemented for employers to provide this support (who would then have the option to outsource it). While employers will benefit from these programs, broader community benefits, along with potential free-riding problems of employer-provided support (due to difficulty internalizing these community benefits) might augur in favor of public provision. A range of scholarship urges employers to take steps to overcome the “entrenched and often unnoticed barriers”,²⁸⁸ preventing employers from providing support for employees, and therefore failing to optimize the employment relationship. Incentives for employers to provide relocation accommodations for long-distance sorters would not only address the relationship and economic costs of strong-tie losses,²⁸⁹ but would also make hiring long-distance sorters modestly more expensive for employers, at least in the short term, leading employers to rely on sorting more judiciously. This would help to enhance the welfare effects of sorting in the face of imperfect decision making.

285. See *supra* Parts III.A.2.a and III.B.3.

286. See Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313, 317, 331–39 (2011) (exploring ways in which universal programs generate greater political support).

287. See *supra* note 278 and accompanying text.

288. See Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Anti-discrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 5 (2010).

289. See Benjamin & Eagles, *supra* note 26, at 259 (discussing the need for broader relocation assistance for spousal employment and family adjustment).

Employers could encourage long-distance movers to create professional strong ties in the new location by supporting activities that bring distance movers together with more senior employees, such as management retreats, company social events, community service activities, and networking functions.²⁹⁰ Intra-company advocacy groups, such as the Xerox Corporation's Black Caucus, can build important ties bridging departments within the firm.²⁹¹ Even firm architecture can make a difference. A lunchroom where distance movers can meet other employees can promote strong ties. This type of sorting support may create a workplace culture that more readily incorporates sorters, normalizing their influx and reducing their lack of legitimacy. Strong workplace ties can also mitigate relationship costs, as coworkers can become personal friends,²⁹² who can then introduce sorters to new ties and help integrate them into the community.

Employers could also establish mechanisms for "outsider" long-distance movers to "borrow" social capital from more senior employees until they earn legitimacy within the firm. Borrowing social capital involves developing a strong tie with a "legitimate" figure and then connecting to that employee's strong ties. In Japan, industry-specific directories that put outsiders in touch with legitimate insider figures assist in developing relationships with Japanese companies.²⁹³ Distance movers could utilize similar directories of legitimate figures within a firm or professional community to borrow social capital.

For long-distance sorters who move with family members, an even bigger concern is the family's adjustment to the area, in particular, a spouse's employment adjustment.²⁹⁴ To ease this stress, and to mitigate the gendered distribution of sorting and clustering, employers could provide assistance for clustering spouses to find work in the new location through local contacts, career counseling, and placement services. The federal government is already at work on providing such support to spouses of service members as part of a

290. See Pearce & Randel, *supra* note 186, at 86 (suggesting that employers promote social interaction between employees to develop greater commitment to the employer).

291. *Id.*

292. See *supra* note 189 and accompanying text.

293. See Ronald S. Burt, *The Network Structure of Social Capital*, 22 RES. ORG. BEHAVIOR 345, 399–400 (2000).

294. See Munton, *supra* note 201, at 105.

government-wide initiative to improve support to military families, especially with relation to repeated long-distance sorting.²⁹⁵

Still further, employers could mitigate the additional pressure on support functions after a long-distance move. The lack of public or private support for caregiving and its interference with employment advancement, especially for women, has received much attention.²⁹⁶ While greater support for caregiving would ease the burdens of sorting, general consideration of this topic is outside the scope of this Article. My focus is different: how mobility measures construct circumstances in which individuals and families are without even their *privately* arranged caregiving supports. Employers could assist sorters with support to regenerate these private arrangements, through, for example, referral services for care-providers, as well as the flexibility to make these arrangements (and to perform more caregiving until they are made). Limiting these services just to the time period after a move provides them when they are most needed and makes them cheaper and thus more palatable to employers.

A number of mechanisms could incentivize employers to provide such accommodations. Employers who provide this sort of support to their employees could get a break in their contributions to the UI fund. Another soft enforcement mechanism would be mandatory disclosure of employers' sorting adjustment policies and programs for new hires and transfers. This type of "targeted transparency"—an increasingly popular tool for nudging private behavior—does not seek merely to provide better information, but also to enhance performance beyond the scope of mandates.²⁹⁷ Many large firms already try to cultivate a reputation for going beyond compliance on salient issues that affect worker welfare,²⁹⁸ like adjustment assistance for long-distance movers. Mandatory disclosure of sorting adjustment programs could lead to a race to the top for these programs. Finally, education campaigns by federal or state labor departments could reduce employers' bias in sorting decisions,

295. See PRESIDENT OF THE UNITED STATES, *supra* note 163, at 15–20. A report rolling out the initiative notes that 93% of the military spouse population is female, that the overall wage gap between civilian and military wives is 42%, and that among households that moved the year prior to the survey, the wage gap rises to over 47%. *Id.*

296. See, e.g., Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005).

297. See Cynthia Estlund, *Just The Facts: The Case For Workplace Transparency*, 63 STAN. L. REV. 351, 376–77 (2011).

298. *Id.* at 378–79.

especially by making employers more aware of the benefits to the firm of employees' strong ties.

Another way to recalibrate sorting costs would be to make an alternative to sorting—telework—cheaper. Aside from a host of environmental and work-family balance benefits of telecommuting,²⁹⁹ the costs of long-distance sorting provide another reason to increase opportunities for telework. Telework would allow a worker to sort without the need for geographic proximity to the workplace. Telework could be supplemented with in-office visits and conference calls so that strong workplace ties can still develop. Although telework is not an option for all jobs, technological improvements and increasing availability of remote work may make this a possibility for a growing number of workers.³⁰⁰ Requirements for federal agencies to implement telework policies and increase the number of off-site workers, as well as more recent support for telecommuting by the President's Council of Economic Advisers³⁰¹ and the First Lady herself,³⁰² suggest that telework may become increasingly common and accepted.

Tax law may serve as an impediment to telework, especially across state borders. An employer located in one state with a single employee telecommuting in another state can face tax obligations from the state where the employee resides.³⁰³ A telecommuting employee whose employer and home are in different states may face double state taxation,³⁰⁴ and telecommuters, as compared to those who are self-employed, may be excluded from the home office tax

299. See Ravi S. Gajendran & David A. Harrison, *The Good, the Bad, and the Unknown About Telecommuting: Meta-Analysis of Psychological Mediators and Individual Consequences*, 92 J. APPLIED PSYCHOL. 1524 (2007).

300. See U.S. CENSUS BUREAU, WORKING AT HOME 2000 (PHC-T-35), TABLE 1-1, ALL WORKERS, AND WORKERS WHO WORKED AT HOME FOR THE UNITED STATES: 1960 TO 2000 (2004) (showing that in the 1980s the number of people working from home increased by more than 50% and in the 1990s by more than 20%).

301. See EXECUTIVE OFFICE OF THE PRESIDENT: COUNCIL OF ECONOMIC ADVISERS', WORK-LIFE BALANCE AND THE ECONOMICS OF WORKPLACE FLEXIBILITY (2010), *available at* <http://www.whitehouse.gov/files/documents/100331-cea-economics-workplace-flexibility.pdf>.

302. *Remarks by the First Lady at a Workplace Flexibility Conference*, WASHINGTON POST, Mar. 31, 2010, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033103642.html>.

303. In a recent tax ruling, Colorado imposed state income and sales tax obligations on a Miami-based company with one telecommuter in Colorado. See Marvin Kirsner, *Tax Rulings Make Trouble for Telecommuting Employees*, S. FLA. BUS. J. (Apr. 12, 2010), <http://www.bizjournals.com/southflorida/stories/2010/04/12/focus5.html>.

304. See Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in Our National Economy*, 8 FLA. TAX REV. 885, 886–87 (2008).

deduction.³⁰⁵ These barriers to telecommuting should be replaced with more favorable tax treatment.

B. Recalibrating Family Clustering

The family cluster can be recalibrated to provide better cushioning for and against long-distance moves by expanding the scope of strong ties recognized as a cluster relevant for geographic purposes. A number of possible configurations, both those limited to times of mobility, as well as broader interventions, are discussed below. To further recalibrate the family cluster, I propose ways in which the law should recognize the significance of strong ties as a reason for long-distance moves.

1. Reconfiguring the family cluster

A narrow intervention would expand the individuals eligible for relocation subsidies beyond the nuclear family. For example, not just spouses, but other strong ties such as close friends or extended family members would be eligible for UI benefits if they wished to move over distances with their strong ties who were relocating for employment purposes. Such subsidies would not have to go to the same individual or individuals upon each move. This would mean that entrenched sorting and clustering roles would be unlikely, as individuals, in shifting relocation ties, could also trade off in sorting and clustering roles. Taking relocation benefits outside of marriage would acknowledge the importance of strong ties in addition to the family cluster. This would especially benefit singles and may help to de-gender sorting and clustering dynamics.

The potential for a larger cluster means that the relative distribution of sorting and clustering could be beneficially adjusted. While one member of the cluster may still receive the primary benefits of sorting, several members could absorb the additional clustering responsibilities, which would afford each more time to balance these with work. Of course, expanding the class of persons who are eligible for clustering subsidies could also expand the number whose employment may be disrupted by a move. Practical considerations would likely keep the members of the cluster to a

305. See I.R.C. § 280A(c)(1) (2006); Lauren Marini, Note, “*Simplification*” Is Not Enough: An Analysis of the Home Office Tax Deduction and the Home Office Simplification Act of 2009, 40 U. BALT. L. REV. 107, 123–24 (2010) (explaining the challenge telecommuters have in showing that home office is used “for the convenience of [their] employer,” in line with deductions allowed under I.R.C. § 280A(c)(1)).

reasonably small number, and the number could be limited to guard against overly disruptive clusters.

Without the security that comes from a more stable commitment, however, strong ties might be reluctant to make a long-distance move, especially in light of strong family clustering norms.³⁰⁶ To shift the contours of the family cluster then requires not just interventions around mobility, but more significant interventions reconfiguring the family cluster—in other words, rethinking the foundational enabling laws that shape the cluster itself. Doing so would require providing legal recognition to non-nuclear family relationships.

One reconfiguration of the cluster would grant marital rights and privileges of care and support to any designated strong tie, what I refer to as “designated partners.” France and Canada already allow two economically interdependent people who live together to designate each other for a legal status in which they perform marriage-like care and support functions.³⁰⁷ Alternatively, as Martha Fineman has proposed, the state could recognize and support relationships that involve dependent caregiving rather than marriage.³⁰⁸ Providing rights and duties of care and support to those outside the nuclear family would reshape the family cluster to include designated partners or Fineman’s caregivers. Facilitating laws could also include relocation subsidies for these designated partners or caregivers.

Expanding family clustering along these lines would afford singles the option to be in the same position as married couples vis-à-vis long-distance moves by entering into a designated partnership: to have one strong tie come with you upon a move, and to have one strong tie not move without you. But a system of designated partners is still limited to a pair (or perhaps a larger but still small number for Fineman’s caregivers), so like marriage, it continues to ignore other strong ties. This option does offer a substantial improvement over marriage in states that restrict the union to

306. See Martha Minow, *“Forming Underneath Everything that Grows”: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 823–24 n.10, 837 (1985) (describing the mutually constitutive and reinforcing nature of legal family norms and social norms).

307. State regulation of strong ties outside of the nuclear family could be subject to the criticism that scholars have raised with regard to legal recognition of same-sex relationships, which is that recognition of these relationships can rob them of their unique character by holding them subject to the prevailing legal norms. See, e.g., Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).

308. There are approximately 3.6 million married Americans living apart (not including separated couples). See KREIDER & ELLIOT, *supra* note 231, at 5.

couples of opposite gender. Same-sex designated partners moving together could change the odds that men or women predominantly sort or cluster, destabilizing gendered sorting and clustering dynamics.

Another reconfiguration of the family cluster would unbundle the rights and privileges associated with marriage and allow individuals, single or married, to divide these rights and privileges among different relationships, as proposed by Laura Rosenbury.³⁰⁹ Not only would this “unbundling” allow spouses and unmarried individuals alike to detach their relocation subsidies from other privileges and expand the scope of strong ties that are recognized upon a move, but by providing rights and privileges to those outside the nuclear family, it would make it more likely that we would remain near or move with these strong ties. The legal unbundling of rights and privileges across strong ties has the expressive power to unravel the tightness of the family cluster as the only site for geographically significant ties.³¹⁰ This could lead to a rebalancing of the domestic family and other strong ties in the mobility calculus. While we may choose to stay near or move with non-nuclear-family strong ties without intervention of the law, arranging one’s life around others is risky without the security that comes with legal protection.

Spreading the rights and privileges associated with marriage across persons, as suggested by Laura Rosenbury, might cut back on the portability of both singles and family clusters. But the flexibility of this scheme would afford some ability to calibrate the portability of the cluster, both through the number of ties that were afforded rights, and how the rights were distributed. Some marital obligations require physical presence (*e.g.*, FMLA benefits); others can be satisfied from afar (*e.g.*, social security benefits). Geographically sensitive obligations could be granted to nearby strong ties that an individual wants to remain near, and geographically insensitive obligations could be granted to strong ties who live far away or are highly mobile. Those seeking more rootedness could spread rights and privileges across multiple persons within her community; those seeking more mobility could be more parsimonious (or could spread these rights and privileges across persons in different geographic

309. The “two-body” problem these couples face has received attention. *See generally* LISA WOLF-WENDEL ET AL., *THE TWO-BODY PROBLEM: DUAL CAREER COUPLE HIRING POLICIES IN HIGHER EDUCATION* (2003).

310. *See* Jennifer Conlin, *Living Apart for the Paycheck*, N.Y. TIMES, Jan. 5, 2009, at B1.

areas where she might move). Some limit on flexibility is needed, however, because at some point the administrability concern outweighs flexibility. A mechanism akin to “divorce” could allow individuals to rearrange rights and duties across strong ties to accommodate long-distance moves. While the flexibility of unbundling may increase the cost of administration,³¹¹ these costs must be balanced against the benefit that, unlike marriage, a take-it-or-leave-it status, this unbundled option allows for individual choice.³¹²

Something akin to this unbundling of marriage is already happening *de facto* in a small but growing number of families.³¹³ While the law embodies a strong presumption of nuclear family unity, employment sorting may trump family clustering such that spouses live apart in “commuter” or “long-distance” marriages, either temporarily or for the duration of the relationship. Historically, long-distance marriage is associated with a couple in which both spouses are strongly attached to geographically specific careers, for example, a dual-academic couple.³¹⁴ In these cases, sorting for both spouses may trump clustering. In the slack labor market of the Great Recession, long-distance marriages are on the rise, and encompass a broader set of couples who have physically separated for lack of better options.³¹⁵

Long-distance spouses face significant challenges in a world where the law grants all care and support obligations to spouses and not to other strong ties. The unbundling of the obligations of marriage would ease some of the burdens of a long-distance marriage by allowing some care and support functions to be provided by other nearby strong ties. While for the vast majority of long-distance marriages, physical separation is a second-best option, these marriages nonetheless may constructively challenge gendered sorting/clustering dynamics. In addition to unbundling the cluster, the law could better support these couples by allowing them to

311. See I.R.C. §§ 163–164 (2006).

312. State regulation of strong ties outside of the nuclear family could be subject to the criticism that scholars have raised with regard to legal recognition of same-sex relationships, which is that recognition of these relationships can rob them of their unique character by holding them subject to the prevailing legal norms. See, e.g., Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).

313. There are approximately 3.6 million married Americans living apart (excluding separated couples). Conlin, *supra* note 310.

314. See generally WOLF-WENDEL, ET AL., *supra* note 309.

315. See Conlin, *supra* note 310.

consider both of their homes primary residences for tax purposes, as current law allows only one home to receive this beneficial tax treatment,³¹⁶ and by providing a tax deduction for the communication and visitation costs of maintaining these relationships.

2. Recognizing relocations motivated by strong ties

Aside from reconfiguring the family cluster, the law could recognize and support strong ties outside the nuclear family by putting relocations motivated by strong ties on equal footing with those motivated by employment sorting. This would mean that whatever benefits are afforded for long-distance sorting should be extended to relocations to be near strong ties. Short of this, the law could provide symmetrical subsidies for corrective relocations. There are two types of moves that would qualify as corrective. First, corrective mobility would be satisfied by a move that returned the movers to a place where they had developed a strong-tie network, for example, a place where they had previously lived. Second, corrective mobility would be satisfied by a move to a place where the mover would have stayed in or moved to but for the influence of the family cluster, for example, a post-divorce move that would allow a clustering spouse to return to her home town. In custody relocation cases, equal consideration should be given to a parent who seeks to move for strong-tie support as a parent who seeks to move for employment. An additionally strong presumption favoring relocation should apply to cases of corrective mobility.

C. Agglomeration: The Benefits of Sorting Without All the Costs

The problem of mobility measures can be seen as a problem of distance: the distance between the jobs of the spouses if both were to sort maximally for employment, and the distance between strong ties that mobility imposes. One solution is to shorten the distance by agglomerating many employment opportunities, as well as strong ties, in one place. This is precisely the benefit provided by cities, and so sorting and clustering might be altered to acknowledge that reality. “Agglomeration economics,” the notion that “individuals and businesses make their location decisions on the basis of where other individuals and businesses decide to locate” has garnered much

316. See I.R.C. §§ 163–164 (2006).

recent attention.³¹⁷ The positive externalities of agglomeration might better balance sorting and clustering considerations.

Agglomeration of firms and people in cities presents increased labor market depth, both on the supply and demand side. Deep labor markets provide a greater opportunity to sort across employers to maximize labor value without changing geography. Labor market depth enhances employment sorting because “[a]s urban workers develop new skills, they can switch to suitable jobs” without moving, which incentivizes human capital investments.³¹⁸ Deep labor markets reduce job search costs, allowing employees to sort among firms more easily and better maximize productivity.³¹⁹ Multiple employment options means one employer failing does not require a move to find other employment. Because of reduced search and sorting costs, incentives to develop human capital, and intellectual spillovers, agglomeration may promote growth better than geographic sorting.

Because agglomeration reduces the need for long-distance moves to sort, labor value can be maximized without sacrificing local strong ties and the support they provide. Of course, sorting across jobs even without a long-distance move will impose the loss of strong workplace ties. But these lost ties will be less significant because they will remain in the circle of local professional contacts. Moreover, the loss of strong ties in the workplace will not be felt as acutely when it is not accompanied by all of the additional losses—strong social ties, spousal job loss, disruption for children—imposed by a long-distance move.

Increasing the ability to sort across jobs without a long-distance move would alleviate the conflict that singles currently face: moving for a job opportunity, or staying near their strongest ties. The more that singles can retain their strong ties over time, the more secure they will feel in those ties, and the more rooted they may become. Greater stability of strong-tie support for singles could go some way towards alleviating the privilege of marriage over other strong ties.³²⁰ Cities also provide singles with a deeper market for new strong ties, which can be important for new friends and for dating, for those who seek to develop new family clusters.³²¹

317. See Schleicher, *supra* note 27, at 1509.

318. *Id.* at 1521.

319. See *id.* at 1532.

320. See Rosenbury, *supra* note 98, at 191 (describing how family law privileges marriage over other mutually supportive relationships).

321. See *id.*

Living in a major metropolitan area can also reduce the conflict between sorting and clustering within the family. The deeper labor markets found in cities present more employment opportunities for two workers in the same place.³²² Indeed, there is a higher percentage of two-career couples in which both spouses have a college degree living in the largest metropolitan areas,³²³ and the gap between married men's and married women's incomes decreases with urban size.³²⁴ Because sorting across jobs will less often require a long-distance move, the strong-tie network remains in place. Although there may be greater career pressures and more demanding work expectations in large metropolitan areas that make it harder to balance work and family, the consistency of strong ties provided by a stable location can offset these demands.

To optimize employment sorting in light of family clustering, it is not just agglomeration, but dense agglomeration that is best. The expense of living in an urban center often leads people to live and work in the suburbs—sometimes different suburbs.³²⁵ This means that individuals commute longer distances between home and work and that maximizing sorting for both spouses, who may have jobs in different suburbs, can involve long commutes. Americans spend on average fifty minutes per day commuting.³²⁶ The number of Americans engaged in extreme commutes—an hour-and-a-half to work and back—has grown 95% since 1990, to 3.4 million workers.³²⁷ While there are many causes for extreme commutes, employment sorting and family clustering are critical sources.³²⁸

The costs of long commutes are difficult to overstate. In addition to fuel expense and pollution, commuting takes a big toll on commuters. Commuting worsens life satisfaction, physical health, and productivity,³²⁹ and causes a hit to strong ties: every ten minutes

322. See WOLF-WENDEL ET AL., *supra* note 309, at 5.

323. See Dora L. Costa & Matthew E. Kahn, *Power Couples: Changes in the Locational Choice of the College Educated, 1940-1990*, 115 Q.J. ECON. 1287 (2000).

324. Pixley & Moen, *supra* note 238, at 186.

325. See Joel Kotkin, *The Protean Future of American Cities*, NEWGEOGRAPHY.COM (Mar. 7, 2011), <http://www.newgeography.com/content/002099-the-protean-future-of-american-cities>.

326. See U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY (2005).

327. See *id.* In 1990, 24% of all workers left their home counties to get to the office; now, 50% of new workers do so. *Id.*

328. Michelle Conlin et al., *Extreme Commuting*, BLOOMBERG BUSINESSWEEK, Feb. 21, 2005, *available at* http://www.businessweek.com/magazine/content/05_08/b3921127.htm.

329. See Jos N. van Ommeren & Eva Gutiérrez-i-Puigarnau, *Are Workers with a Long*

of commute time cuts one's social connections by 10%.³³⁰ Long commutes also burden the already tight time allocation for employment and caregiving demands. Women are less likely to take on long commutes for this reason, limiting their employment opportunities in the context of sprawl.³³¹

Many employers and residents already recognize the benefits of cities by choosing to locate there. A significant barrier to agglomeration is the expense of city living, although this expense is at least partially compensated by an urban wage premium.³³² The expense is particularly significant for families, who tend to be more concerned with the cost of housing given the need for a larger home, as well as access to good public schools. But residential location decisions between relatively more or less dense areas are not independent from legal policies that have affected the cost of such decisions. Over the last several decades, transportation and housing law and policy have subsidized suburban and exurban sprawl that has made suburban and exurban living relatively cheaper in relation to city living and thus influenced housing and capital location decisions.³³³

Shifting the relative costs of urban as compared with suburban or exurban locations will make it more attractive for both individuals and firms to sort to cities. Others have considered how to make cities relatively cheaper through modifying housing and transportation policies.³³⁴ The costs associated with long-distance sorting, and the potential for agglomeration to alleviate these costs, is another reason to adjust the cost of city living.

Although recalibrating the cost of locating in more and less dense areas may be best addressed outside of employment law and family law, mobility measures could be recalibrated so that when sorting happens, it is more likely to be to cities. One way to promote agglomeration through mobility measures would be to make sorting to cities cheaper for employees, through a bonus subsidy for these moves. Another way to promote sorting to cities would be to

Commute Less Productive? An Empirical Analysis of Absenteeism, 41 REGIONAL SCI. & URB. ECON. 1, 2 (2011).

330. ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 178 (2000).

331. Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1826 (2007).

332. See GLAESER, *supra* note 27, at 52.

333. See Silbaugh, *supra* note 331, at 1818.

334. See GLAESER, *supra* note 27, at 139–47.

enhance employment opportunities there either directly or indirectly by encouraging employers to locate there. For example, employers could be granted further favorable UI treatment, in the form of reduced contributions into the system, by hiring employees in metropolitan areas. Favorable tax treatment for city hires could also be applied. Public-private partnerships for economic growth, including both industrial recruitment and more entrepreneurial approaches, could target more resources towards densely populated metropolitan areas. Not only do these investments reap greater rewards when they are aimed at areas where there is already agglomeration,³³⁵ but such investments would also drive more capital, and thus more employees, towards cities.

VI. CONCLUSION

Good work and close ties, both inside and outside the family, are two of the most crucial ways we imbue our lives with meaning—and two of the most crucial aspects of life that affect and are affected by geographic mobility. Employment law and family law together play a central role in regulating these critical parts of our lives, and so together force us to ask the question “how portable is your life?” By looking at the ways in which these areas of law affect how, why, and how often we move over distances, we can bring more conscious consideration to the question of how portable our lives are, and perhaps even more importantly, how portable we want them to be.

Greater legal recognition of the significance of place-specific investments, in addition to bearing relationship and economic fruit, has the further potential even to change—and enhance—our relationship to place. Moreover, because good work and strong ties have different meanings for everyone, shifting the legal boundaries of how and why we move, and what we can take along with us, may open up a more flexible space to recognize work and ties in ways that better accommodates varied preferences and circumstances. By recalibrating the portability of work and significant relationships, modified mobility measures may allow us to derive more satisfaction and reward from both—providing more and better answers to the portability question than we thought possible.

335. See J. Craig Jenkins et al., *Do High Technology Policies Work? High Technology Industry Employment Growth in U.S. Metropolitan Areas, 1988-1998*, 85 SOC. FORCES 267, 289 (2006).

